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Supreme Court, U.S.
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No. 08-____

IN THE
Supreme Court of the United States

THE LIGHTHOUSE INSTITUTE FOR EVANGELISM, INC. AND REV. KEVIN BROWN,
Petitioners,

v.

THE CITY OF LONG BRANCH,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Equal Terms Provision of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc(b)(1), which provides that

> No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

simply means what it says, or whether the strict scrutiny test must be imported into it, as the Eleventh Circuit holds, or whether a "similarly situated" test must be imported into it, as the Third Circuit now holds?

2. Whether, in a Free Exercise challenge to a government program of categorical and individualized exemptions within the meaning of *Employment Division* v. *Smith*, a religious plaintiff must show not only the existence of this system but also discriminatory intent?

PARTIES TO THE PROCEEDING

Petitioners The Lighthouse Institute for Evangelism and Rev. Kevin Brown were the plaintiffs-appellants below. Respondent the City of Long Branch was the defendant-appellee below.*

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29(6), Petitioner The Lighthouse Institute for Evangelism states that it does not have a parent corporation, nor does it issue any stock.

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* BCIC Funding Corp., Breen Capital Services, Inc., Abrams, Gratta & Falvo, P.C., Peter S. Falvo, John Does A-Z and Eugene M. Lavergne were defendants in the district court.

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IN THE

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THE LIGHTHOUSE INSTITUTE FOR EVANGELISM, INC. AND REV. KEVIN BROWN,

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v.

THE CITY OF LONG BRANCH,

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

The Lighthouse Institute for Evangelism and Reverend Kevin Brown respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the Third Circuit is reported at 510 F.3d 253. Appendix ("App.") at 1a. The opinion of the United States District Court for the District of

New Jersey is reported at 406 F.Supp.2d 507. App.94a. The prior appellate opinion regarding the motion for preliminary injunction is reported at 100 Fed. Appx. 70. App. 130a. The district court decision denying the preliminary injunction was not reported, but is included in the Appendix. App. 143a.

JURISDICTION

The Third Circuit's judgment was entered on November 27, 2007. App. 93a. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech." U.S. CONST. amend. I. The Fourteenth Amendment to the United States Constitution provides in relevant part: "No state shall ... deny to any person within its jurisdiction the equal protection of the laws." *Id.*, amend. XIV.

The Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc ("RLUIPA"), provides in relevant part:

> § 2000cc. Protection of land use as religious exercise
>
> . . . .
>
> **(b) Discrimination and exclusion**

> (1) Equal terms
>
> No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.
>
> . . . .

Id.

STATEMENT OF THE CASE

I. Factual Background

The Lighthouse Institute for Evangelism is a mission church seeking to minister to the poor and disadvantaged in downtown Long Branch, New Jersey, App. 4a, a city where nearly one quarter of the households earn less than $15,000 per year. App. 55a. The downtown area reflects this poverty; the City has variously described the downtown area as one of "vacant lots and poorly maintained buildings" and "unused buildings[,] incompatible uses and undesirable conditions." R. 88, 228.[1]

Lighthouse specifically chose this downtown location so that it could minister to the poor "where the needs were most acute." App. 55a. Lighthouse opened its doors in 1992 at a leased property at 159 Broadway, where it held prayer meetings and Bible studies and served hot meals to those in need. App.

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[1] "R." citations are to the record below, specifically, the joint appendix submitted to the Court of Appeals.

55a. In 1995, Lighthouse was able to purchase its own property—the abandoned building at 162 Broadway, located directly across the street from its first location. App. 55a-56a. It planned to renovate that building so that it could operate a soup kitchen, hold worship services, and conduct religious education, "provid[ing] a variety of benevolent services to the community in which it has operated and seeks to operate." App. 55a-56a. The then-Mayor of Long Branch wrote Lighthouse congratulating it on its decision to purchase 162 Broadway and awarded it a small grant "for the expansion of [its] soup kitchen." App. 56a.

162 Broadway is located in what was then the downtown commercial district, or C-1 zoning district. App. 5a. In the C-1 district, the City permits various secular assemblies—most notably "assembly hall[s]"[2]—but not religious assemblies like churches or synagogues. *Id.*

After purchasing 162 Broadway, Lighthouse began seeking permission to hold worship services, a soup kitchen, and other ministry-related activities there. App. 56a-57a. The City denied those attempts, despite the fact it had allowed Lighthouse to operate for years across the street. App. 56a-57a. In April 2000, Lighthouse applied for a permit to use 162 Broadway as a church, but the City denied the permit the very next day because Lighthouse was "not a permitted use in the Zone." App. 6a, 59a.

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[2] Other permitted uses include restaurants, educational services, colleges, film theaters, and municipal buildings. App. 5a.

Other applications for religious use of 162 Broadway were rejected on the grounds that they were incomplete. However, there was summary judgment "evidence to support Lighthouse's assertion that the City deliberately put the Reverend and his church on the bureaucratic equivalent of an Escher staircase, creating and enforcing an endlessly recursive zoning procedure . . . ." App. 72a n.11.

On June 8, 2000, Lighthouse filed suit in state court for constitutional and other violations; the City removed the case to federal court. App. 6a. After RLUIPA was enacted in September 2000, Lighthouse filed an amended complaint adding counts under RLUIPA and the Free Exercise clause. App. 6a, 59a. In March 2001, Lighthouse moved for a preliminary injunction. App. 59a. The motion was denied. *Id.*

II. The First Court of Appeals Opinion

Lighthouse appealed that denial to the Third Circuit. In an unpublished opinion, the Third Circuit upheld the denial on the curious grounds that Lighthouse had not shown that it was actually prohibited from operating in the area, since it might qualify to operate as "an assembly hall." App. 134a-36a. "Although a number of religious uses are identified in [planning dictionary] definitions of assembly hall, we note that the term 'church' may in fact encompass a range of activities which would extend beyond the concept of an 'assembly hall.'" App. 135a. For this reason, "denial of the Mission's application as a 'church' does not establish whether the Mission's application would have been approved as an 'assembly hall.'" App. 135a-36a. Judge Gibson

concurred in the result and judgment only, stating, "The term 'Assembly Hall' seems on its face to include a hall where people assemble for religious purposes. In my view the rejection of the church's application therefore demonstrates approval of secular assemblies and rejection of religious assemblies." App. 142a. Judge Gibson went on to say, "Nor is the effect of the discrimination mitigated because the church could have operated elsewhere in the city; the church's mission, to 'serve the poor and disadvantaged in downtown,' can only be accomplished downtown." *Id.* Judge Gibson stated that these issues should be "ventilated in the hearing still to come." *Id.* The case returned to the district court, where the City promptly took the position that it would not permit Lighthouse to operate as an "assembly hall" but would only allow it to apply as a "church." R.103.

III. The Redevelopment Guidelines

In 2002, while the case was pending in the district court, the City declared the downtown area (or "Broadway Corridor") an area in need of redevelopment, and adopted the Redevelopment Guidelines. App. 8a-9a. The Redevelopment Guidelines are a plan for creating a commercial and artistic center full of "rich and varied uses" in the downtown area. App. 8a-9a, 61a. They supplant the former C-1 zoning regulations. App. 8a. The Redevelopment Guidelines, which are far more detailed than the original ordinance, include rigorous procedures for obtaining permission to develop a particular property. App. 8a-9a, 60a-62a & n.25. Potential developers need not be property owners; if

an approved developer is not able to obtain the property he wishes to develop, the City will seize the property through eminent domain and transfer it to the developer. App. 9a.[3]

The Redevelopment Guidelines, like the C-1 Ordinance before them, permit theaters, cinemas, music instruction, fashion design schools, and culinary schools, among other uses. App. 9a. The Redevelopment Guidelines do not permit churches or religious educational institutions in the Redevelopment Zone. *Id.* Following the new guidelines, Lighthouse submitted an application to become the developer of 162 Broadway, together with a request for a waiver permitting church use of that property. App. 10a. The application was denied. *Id.* The City claims the application was denied as incomplete. *Id.* However, comments by City officials about the church's application indicate that the City would not have granted the application in any case. App. 10a-11a, 62a-63a. City officials stated Lighthouse would have a "detrimental" effect on the zone and would "destroy the ability of the block to be used as a high end entertainment recreation area." App. 10a-11a, 62a-63a. As justification for these fears, the City cited a state law that prohibits liquor licenses within 200 feet of churches, absent a waiver from the church.[4] App. 10a-11a. Lighthouse had

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[3] Although not part of the record on appeal, the City is presently attempting to seize 162 Broadway by eminent domain. However, this does not affect any issue in this case, as Petitioners seek damages.

[4] It is undisputed that Lighthouse has repeatedly affirmed its willingness to waive this restriction. App. 83a. The dissent

already agreed to issue all necessary waivers. App. 63a.

IV. Summary Judgment

In 2005, the parties submitted cross-motions for summary judgment, and the district court granted summary judgment for the City on all counts. App. 95a. It granted summary judgment on Lighthouse's Equal Terms claims, holding that Lighthouse failed to prove a requisite substantial burden, was not similarly situated to any non-religious assembly, and that the City's ordinances passed strict scrutiny. App. 107a-09a, 111a-12a. It disposed of Lighthouse's Free Exercise claims on similar grounds. App. 115a-18a. Lighthouse appealed only its RLUIPA Equal Terms and Free Exercise claims. App. 12a-13a.

V. The Second Court of Appeals Opinion

On appeal, a divided panel of the Court of Appeals panel vacated in part and affirmed in part. The opinion of Judge Roth, joined by Judge Fisher, began by noting that "the parties substantially agree" that the C-1 Ordinance and the Redevelopment Guidelines "are land use regulations within the meaning of [RLUIPA]," that Lighthouse "is a religious assembly," and that "several of the permitted uses under both ordinances are non-religious assemblies." App. 18a.

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suggested, App. 83a n.38, that this statute may be invalid under *Larkin* v. *Grendel's Den*, 459 U.S. 116 (1982).

The majority then held that the former C-1 Ordinance violated RLUIPA's Equal Terms Provision because it permitted secular, but not religious, assemblies. App. 41a-42a. The old C-1 Ordinance had no statement of purpose, and therefore no discernible reason for permitting secular assemblies but excluding religious ones. *Id.* The majority vacated the district court's opinion on that count. App. 42a. It deemed Lighthouse's claim for injunctive relief based on the C-1 Ordinance moot, but held that its damages claim based on the C-1 Ordinance survives. *Id.*

By contrast, the majority held that the Redevelopment Guidelines did not violate RLUIPA, because Lighthouse had not identified a similarly situated non-religious comparator. App. 36a-41a. The majority held that, to prove a RLUIPA violation, Lighthouse had the burden of demonstrating that permitted secular uses "cause[] no lesser harm to the interests the regulation seeks to advance." App. 36a. The majority noted that this similarly situated requirement was in direct conflict with the Eleventh and Seventh Circuits, which had specifically rejected a similarly situated requirement. App. 31a-34a.

Applying this unique standard, the majority found that Lighthouse's challenge to the Redevelopment Guidelines failed due to a state law that restricts liquor licenses within 200 feet of churches. App. 37a. "[C]hurches are not similarly situated to the other allowed assemblies with respect to the aims of the [Redevelopment] Plan" because "churches would fetter Long Branch's ability to allow establishments with liquor licenses into the

Broadway Corridor." *Id.* The majority held that this was a legitimate reason for the City to allow secular assemblies under the Redevelopment Plan, but prohibit churches. App. 36a-41a.

The Court explicitly noted its disagreement on this point with the Seventh Circuit's opinion in *Digrugilliers* v. *Consolidated City of Indianapolis,* 506 F.3d 612 (7th Cir. 2007) (Posner, J.), which held that a similar liquor license restriction could not be used to restrict the rights of religious institutions. App. 38a n.15.

The majority also ruled that the Redevelopment Guidelines did not violate the Free Exercise clause. App. 42a-53a. The majority based this ruling on its finding that Lighthouse had failed to prove that the Redevelopment Guidelines burdened its religious exercise, and on its finding that the Redevelopment Guidelines were neutral, generally applicable, and did not constitute a system of individualized exemptions. *Id.*

Judge Jordan filed a 41-page dissent. He sharply disputed the majority's notion that there is a "similarly situated" requirement in RLUIPA § 2(b). App. 66a. Judge Jordan acknowledged "the need for some kind of comparator," but stated that "unlike the majority, I do not believe the statute requires any greater similarity than is inherent in the broad terminology 'assembly or institution,' *i.e.*, the terminology of the statute itself." App. 66a-67a. Agreeing with the Eleventh Circuit, Judge Jordan opined that the proper comparators are secular "assembl[ies]" and "institution[s]," and that those

terms should be given their "ordinary or natural meaning[s]." App. 69a-71a & n.29.

Pointing to decisions by the Eleventh and Seventh Circuits, Judge Jordan argued that the plain-text approach to RLUIPA will not lead to a "parade of horribles." App. 74a-75a. Churches may still be excluded from zones where secular assemblies are excluded, like the residential zones in *Konikov* v. *Orange County*, 410 F.3d 1317 (11th Cir. 2005), and may be regulated by evenhanded restrictions, like the building size restriction in *Vision Church* v. *Village of Long Grove*, 397 F. Supp. 2d 917 (N.D. Ill. 2005), *aff'd*, 468 F.3d 965 (7th Cir. 2006). App. 73a-75a.

Judge Jordan did not reach the Free Exercise claims as such (since he would have resolved the case under RLUIPA), but raised questions about the majority's First Amendment ruling on these facts. In particular, he focused on the question of neutrality: "On what principled basis can an art workshop or a cooking class be governmentally preferred to a theological or philosophical discussion in Sunday School?" App. 80a. Judge Jordan argued that earlier Free Exercise precedents relied upon by the majority were inapposite because those cases dealt with selective enforcement of facially neutral laws, rather than laws that are non-neutral on their face, like the ordinances here. App. 84a-88a.

REASONS FOR GRANTING THE WRIT

The Courts of Appeals are divided over construction of the Equal Terms Provision of the

Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. § 2000cc; over construction of the Free Exercise Clause of the First Amendment in the religious land-use context; and over the relationship between those two issues. This case affords the Court an excellent opportunity to mend that division.

A divided panel of the United States Court of Appeals for the Third Circuit has expressly repudiated the Eleventh and Seventh Circuits' construction of RLUIPA. It has done so, moreover, in order to "limit the statute" and thus make RLUIPA conform to the panel majority's understanding of *Employment Division* v. *Smith*, 496 U.S. 913 (1990), App. 29a n.11, and avoid questions about its propriety under Section Five of the Fourteenth Amendment. Ironically, that also seems to have been the motivation for the Eleventh Circuit's own, different surgery on RLUIPA.

The Equal Terms Provision of RLUIPA, 42 U.S.C. § 2000cc (b)(1), states simply:

> No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

Id. Both the Eleventh Circuit and the majority below find that simplicity problematic. They differ over what to do about it.

The majority below chides the Eleventh Circuit for "incorporating additional terms" into RLUIPA

because that court reads a compelling interest standard into the statute instead of the strict liability that follows from its plain language. As the majority points out, Section 2(b)(1), unlike Section 2(a) of RLUIPA, says nothing whatever about strict scrutiny. The Eleventh Circuit simply imports it into that section in an effort to make it more closely resemble *Smith*. As the majority below diagnoses the problem, the Eleventh Circuit was driven to this error by its prior error of giving a broad interpretation to the core Equal Terms language of Section 2(b)(1). App.31a-32a n.13 (rejecting Equal Terms standard in *Midrash Sephardi, Inc.* v. *Town of Surfside*, 366 F.3d 1214, 1232 (11th Cir.2004)).

The majority below is pleased to report that it has fallen into neither sin. "[U]nlike [that] court, we have come to a constitutionally acceptable interpretation of Section 2(b)(1) without" adding such additional terms. App. 32a n.13.

In spotting the speck in the Eleventh Circuit's eye, however, the majority below overlooks the plank in its own. The way that the majority below reached its "constitutionally acceptable interpretation" of Section 2(b)(1) was by incorporating into the Equal Terms language—that is, the language the Eleventh Circuit left alone—an additional requirement of its own. That requirement was that "a religious plaintiff under the Equal Terms Provision must identify a better-treated secular comparator that is similarly situated in regard to the *objectives* of the challenged regulation." App. 33a. (emphasis original).

It is not enough, the majority explains, that a religious plaintiff demonstrate that it is being treated "on less than equal terms with a nonreligious assembly or institution," which is all that Section 2(b)(1) requires. No, it must also demonstrate that the permitted secular uses "cause[] no lesser harm to the interests the regulation seeks to advance." App. 36a. Thus, in the present case, the majority found that Lighthouse's challenge to the Redevelopment Guidelines failed because of another state law that restricts liquor licenses within 200 feet of churches. App. 37a. "[C]hurches are not similarly situated to the other allowed assemblies with respect to the aims of the [Redevelopment] Plan" because "churches would fetter Long Branch's ability to allow establishments with liquor licenses into the Broadway Corridor." *Id.* The majority held that this was a legitimate reason for the City to allow secular assemblies under the Redevelopment Plan, but prohibit churches. App. 36a-41a.

In short, both the majority below on the one hand, and the Eleventh and Seventh Circuits on the other, were nervous about RLUIPA's relationship to *Smith*.[5] The majority below thinks it's rescuing

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[5] The Seventh Circuit has adopted the Eleventh Circuit's Equal Terms standard. *See Vision Church* v. *Village of Long Grove*, 468 F.3d 975, 1002 (7th Cir. 2006), *cert denied*, 128 S. Ct. 77 (2007) (quoting *Konikov* v. *Orange County*, 410 F.3d 1317, 1324 (11th Cir. 2005)) ("the standard for determining whether it is proper to compare a religious group to a nonreligious group is not whether one is 'similarly situated.'"); *Petra Presbyterian Church* v. *Village of Northbrook*, 489 F.3d 846, 849 (7th Cir. 2007), *cert. denied*, 128 S.Ct. 914 (2008) (citing *Midrash* for proposition that RLUIPA's Equal Terms Provision incorporates the *Lukumi* standard).

RLUIPA by narrowing the Equal Terms language and leaving the liability standard alone,[6] whereas the Eleventh Circuit thinks it is rescuing RLUIPA by leaving the Equal Terms language alone and narrowing the liability standard.[7] Neither is willing to allow the language of Section 2(b)(1) to mean simply what it says.

This is not just an abstract disagreement. The differing approaches yield strikingly different results. In *Digrugilliers* v. *Consolidated City of Indianapolis,* 506 F.3d 612 (7th Cir. 2007), the Seventh Circuit was faced with facts similar to those in this case. There, as here, a state law prohibited liquor licenses within 200 feet of churches. *Id.* at 616. And there, as here, the city relied upon this state law as its justification for prohibiting churches but permitting secular assemblies in the zone. *Id.* But there, unlike here, the Court held that the state law could not justify treating religious organizations on worse terms, and so violated RLUIPA. In an opinion by Judge Posner, the court held that secular and religious land uses could be comparable for Equal Terms purposes even if a state law treats

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[6] The majority below identified an additional virtue of this approach. "Because we limit the statute in this way," it explained, it needn't reach the question of "Congress's authority under Section 5 [of the Fourteenth Amendment] to impose what amounts to a strict liability standard for regulations that violate the terms of the Equal Terms provision." App. 29a n.11.

[7] As the majority below noted, a subsequent panel of the Eleventh Circuit read its own version of a similarly situated requirement into as-applied challenges. App. 32a (citing *Konikov*). This only furthers the confusion.

them differently. *Id.* at 616-7. "Government cannot, by granting churches special privileges . . . furnish the premise for excluding churches from otherwise suitable districts." *Id.* By contrast, no church in the Third Circuit (or at the very least in New Jersey) will ever be similarly situated to a secular assembly unless that secular assembly also restricts the location of liquor licenses. Indeed this logic has no obvious stopping point. It would seem that no church anywhere in the Third Circuit could ever be similarly situated to any for-profit assemblies, because the church is tax-exempt and they are not.

As we noted above, the divergence between the Eleventh Circuit and the majority below is premised upon its confusion about the Free Exercise Clause. That confusion, it turns out, runs deep. In its analysis directly under the Free Exercise Clause, the majority struggles with both *Smith* and *Church of the Lukumi Babalu Aye* v. *City of Hialeah,* 508 U.S. 520 (1993). App. 25a, 34a, 48a-52a. The majority holds that non-religious assemblies aren't really "categorically exempted" from restrictions that apply to religious assemblies, as long as "the local government pursued its aims evenhandedly[.]" App. 49a. Second, it holds that a *Smith*-style "system of individualized exemptions" exists only where it is tied to a finding of discriminatory intent. App. 50a-52a.

Both notions are wrong, and for the same reason. Greater scrutiny of categorical exemptions and "systems of individualized exemptions" under *Smith* and *Lukumi* is meant to be a form of *structural* protection. Like the unbridled discretion doctrine in

the Free Speech context, this doctrine protects religious organizations from covert discrimination that would otherwise be too difficult for plaintiffs to prove. Forcing plaintiffs to show discriminatory intent ignores the entire purpose of this protection and turns it into a mere reiteration of the separate requirement that governments remain neutral towards religion. *Cf. Blackhawk* v. *Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004) (Alito, J.) ("[A] law must satisfy strict scrutiny if it permits individualized, discretionary exemptions because such a regime ***creates the opportunity*** for a facially neutral and generally applicable standard to be applied in practice in a way that discriminates against religiously motivated conduct.") (emphasis added, citation omitted).

In sum, this case demonstrates well the lower courts' confusion about both the statutory and constitutional bases for Free Exercise in the land use context. It is therefore an excellent vehicle for resolving that confusion.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 25, 2008 *Counsel for Petitioners*

APPENDIX

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-1319

THE LIGHTHOUSE INSTITUTE FOR
EVANGELISM, INC.,
doing business as THE LIGHTHOUSE MISSION;
REVEREND KEVIN BROWN,

Appellants

v.

CITY OF LONG BRANCH; BCIC FUNDING CORP;
BREEN CAPITAL SERVICES, INC.;
ABRAMS GRATTA & FALVO, P.C.;
PETER S. FALVO, ESQ.; JOHN DOES A-Z;
EUGENE M. LAVERGNE, ESQ.

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 00-cv-03366)
District Judge: Hon. William H. Walls

Argued on March 27, 2007

Before: FISHER, JORDAN and ROTH, Circuit Judges

(Opinion Filed November 27, 2007)

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OPINION

ROTH, Circuit Judge:

This appeal requires us to clarify the nature of the constitutional and statutory protections enjoyed

by religious assemblies against governmental interference in the form of land-use regulations. The plaintiff/appellants are the Lighthouse Institute for Evangelism, which describes itself as "a Christian church that seeks to minister to the poor and disadvantaged in downtown Long Branch, New Jersey," and its pastor, the Reverend Kevin Brown.[1] The City of Long Branch is the defendant.

The case reaches us on appeal from the grant of summary judgment to Long Branch on Lighthouse's facial challenge to two Long Branch zoning ordinances which prevented Lighthouse from locating in a certain area of downtown Long Branch. Lighthouse challenged the ordinances under the Free Exercise Clause of the First Amendment and the Equal Terms provision of the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc(b)(1).[2]

The primary question on this appeal is whether a municipality may exclude religious assemblies or institutions from a particular zone, where some secular assemblies or institutions are allowed, without violating the Free Exercise Clause of the First Amendment or RLUIPA's Equal Terms Provision.

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[1] References to "Lighthouse" in this opinion are to both plaintiffs unless otherwise specified.

[2] RLUIPA's Equal Terms provision reads: "EQUAL TERMS-No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." 42 U.S.C. § 2000cc(b)(1).

For the reasons explained below, we will affirm in part and vacate in part the District Court's decision on the crossmotions for summary judgment and we will remand this case to the District Court for further proceedings consistent with this opinion.

I. Factual and Procedural Background

A. The Initial Dispute

Lighthouse began renting space at 159 Broadway in downtown Long Branch in 1992. At the end of 1994, Lighthouse purchased nearby property at 162 Broadway (the Property). The Property was then located within the C-1 Central Commercial District, which was subject to City of Long Branch Ordinance 20-6.13 (the Ordinance). The Ordinance enumerated a number of permitted uses, including among others: restaurant; variety store and other retail store; educational service and college; "Assembly hall, bowling alley, and motion picture theater;" governmental service; municipal building; and new automobile and boat showrooms. A church was not listed as a permitted use.

Between 1995 and 2000, Lighthouse attempted to obtain permission from Long Branch to employ the Property for a number of uses, including as a soup kitchen, a job skills training program, and a residence for Rev. Brown, but the use was denied in each case because the application was incomplete or because the requested use was not permitted.[3]

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[3] Rev. Brown continued to live on the premises without permission for a time.

Lighthouse was allowed, however, to use the Property as an office.

On April 26, 2000, Lighthouse submitted an application for a zoning permit to use the Property as a church. Long Branch denied the application because the "proposed use [was] not a permitted use in the Zone" and "would require prior approvals from the Zoning Board of Adjustment." Lighthouse did not seek a variance or appeal the decision.

B. First Round of Litigation

On June 8, 2000, Lighthouse filed suit in state court against Long Branch and other defendants, alleging a variety of constitutional and other violations. Long Branch removed the case to federal court. In September 2000, Congress enacted the Religious Land Use and Institutionalized Persons Act (RLUIPA). Lighthouse promptly amended its complaint to add claims under sections 2(a) and 2(b) of RLUIPA (42 U.S.C. §§ 2000cc(a) and (b)(1)-the "Substantial Burdens" and "Equal Terms" sections), claiming that the Ordinance violated RLUIPA both on its face and as applied.[4] Lighthouse requested injunctive relief as well as damages of eleven million dollars for Lighthouse and $7,777,777 for Rev. Brown.

The District Court dismissed as either

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[4] Lighthouse did not appeal the District Court's grant of summary judgment to Long Branch on its claims under the Substantial Burdens section; therefore, those claims are not before us.

unexhausted or unripe all the claims attacking the Ordinance as applied and denied Lighthouse's motion for a preliminary injunction. Lighthouse appealed the denial of the preliminary injunction. We affirmed in a nonprecedential opinion. *Lighthouse Inst. for Evangelism Inc. v. Long Branch,* 100 Fed.Appx. 70 (3d Cir.2004) ("*Lighthouse I* "). We reasoned that the record did not show that the Ordinance on its face barred the use of the property as a church; in particular, it was not clear to us that Lighthouse would not gain approval of its intended use by applying as an "assembly hall." *Id.* at 74-75. We noted also that Lighthouse had not proferred evidence that the Ordinance was not a neutral law of general applicability. Thus, under the rule of *Employment Div., Dep't of Human Res. v. Smith,* 494 U.S. 872, 879, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), it could not be defeated by a Free Exercise claim alone. For that reason, we concluded that Lighthouse did not have a reasonable probability of success on the merits of its claim that the Ordinance on its face violated the Free Exercise clause. *Lighthouse I,* 100 Fed.Appx. at 75-76. As to the RLUIPA "equal terms" claim, we noted again that it was not clear that the use of the Property as a church would not be approved under the "assembly hall" language. We also concluded that Lighthouse had "failed to provide evidence to support its contention that the secular assemblies it identified were actually similarly situated such that a meaningful comparison could be made under this provision." *Id.* at 77.

C. The Redevelopment Plan

While the litigation on the Ordinance made its way through the courts, the applicable zoning ordinance was changed. On October 22, 2002, Long Branch adopted a Redevelopment Plan under N.J.S.A. 40A:12A-7 that strictly limited the use of properties within the "Broadway Corridor" area.[5] The Property was located in this area. The Broadway Redevelopment Plan (the Plan) superseded the Ordinance as the land use regulation applicable to the Property.

Long Branch adopted the Plan "in order to achieve redevelopment of an underdeveloped and underutilized segment of the City."The goals of the redevelopment included "[s]trengthen[ing] retail trade and City revenues," "[i]ncreas[ing] employment opportunities," and "[a]ttract[ing] more retail and

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[5] N.J.S.A. 40A:12A-7 regulates the adoption and implementation of a redevelopment plan and requires that such a plan may not be adopted without "a finding that the specifically delineated project area is located in an area in need of redevelopment or in an area in need of rehabilitation, or in both." N.J.S.A. 40A:12A-7(a). It also provides that

> The redevelopment plan shall include an outline for the planning, development, redevelopment, or rehabilitation of the project area sufficient to indicate:
>
> > (1) Its relationship to definite local objectives as to appropriate land uses, density of population, and improved traffic and public transportation, public utilities, recreational and community facilities and other public improvements.
> >
> > (2) Proposed land uses and building requirements in the project area.

Id.

service enterprises." The Property is located in the "Broadway Corridor" of the redevelopment area, a "Regional Entertainment / Commercial" sector where the City aimed to encourage a "vibrant" and "vital" downtown residential community centered on a core "sustainable retail 'main' street." Primary uses in that sector included theaters, cinemas, culinary schools, dance studios, music instruction, theater workshops, fashion design schools, and art studios and workshops. Restaurants, bars and clubs, and specialty retail (including book and craft stores), among others, were allowed as secondary uses. Churches were not listed as a permitted use, nor were schools or government buildings; the Design Guidelines under the Plan provided that "[a]ny uses not specifically listed" were prohibited.

The Plan also created new application requirements for development within the relevant area. The first step in the process, the RFQ (Request for Qualifications), required applicants to describe the development team members' expertise and qualifications. The second step, the RFP (Request for Proposal), required a detailed description of the project. No property could be developed in the Redevelopment Area until the plans had been approved by the City Council. The Plan provided that the approved developers would acquire the necessary properties from their owners, but reserved the right for Long Branch to condemn properties if negotiations failed.

The Plan did not include an individual waiver procedure, but the Plan could be amended by ordinance of the City Council after review of the

proposed amendment by the Planning Board.

On November 11, 2003, Lighthouse, as the "Long Branch Center of Faith," submitted an RFQ seeking to be designated as developer for the Property. The application, about one page long, also requested a "waiver of prohibition of church use." It specified that Rev. Brown sought "to use the property as a church and for church related functions, including assembly for prayer, pastoral residence, church offices, and a religious gift shop from the storefront portion in front of the property." The RFQ was not approved.

Lighthouse appealed to the Long Branch City Council. The City Council held an evidentiary hearing, at which Rev. Brown and two Long Branch planners presented testimony. The City Council denied the appeal, first, because the proposed use was "not permitted in the zone," and, second, because the application was insufficient since it contained no information as to finances, scope of the project, size of the congregation, aesthetics or design. The City Council also denied the request for amendment of the Plan because the "inclusion of a storefront church would jeopardize" the development of the Broadway area, which was envisioned as "an entertainment/commercial zone with businesses that are for profit."[6] The City Council found that a church would "destroy the ability of the block to be used as a

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[6] Although Lighthouse's request was for a "waiver," the City Council appears to have considered it to be a request for an amendment of the Plan since the Plan did not provide for waivers.

high end entertainment and recreation area" due to a New Jersey statute which prohibits the issuance of liquor licenses within two hundred feet of a house of worship.[7]

D. Subsequent Litigation

After we remanded *Lighthouse I* (affirming the denial of preliminary injunction), Lighthouse filed an amended complaint, claiming that the Plan violated the Free Exercise Clause and RLUIPA. *Lighthouse Inst. for Evangelism v. Long Branch*, 406 F.Supp.2d 507 (D.N.J.2005)(*Lighthouse II*). The parties filed cross-motions for summary judgment. The District Court granted Long Branch's motion for summary judgment on all claims and denied Lighthouse's cross-motion for partial summary judgment. *Id.* at 510.[8]

The District Court held that neither the

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[7] The City Council also mentioned the existence of a Long Branch ordinance prohibiting the issuance of liquor licenses within 1,000 feet of a house of worship. Since this ordinance is not in the record and there is significant disagreement as to what exactly it proscribes and whether it even applies within the relevant area of Long Branch, we will not include it in our considerations.

[8] Lighthouse had moved for summary judgment on the following claims: (1) facial invalidity of the Ordinance under the Free Exercise Clause (Count III); (2) denial of equal protection of the laws to Lighthouse through Long Branch's zoning laws (Count V); (3) violations of the New Jersey Constitution (Count VIII); (4) Violation of RLUIPA, 42 U.S.C. § 2000cc(a)(1) and (b) by the Ordinance (Count XIII); (5) Violation of RLUIPA, 42 U.S.C. § 2000cc(a)(1) and (b) by the Plan (Count XIV).

Ordinance nor the Plan violated RLUIPA's Equal Terms provision, 42 U.S.C. § 2000cc(b)(1). The court concluded that in order to prevail on a claim based on this provision, a religious assembly or institution must show that it is being treated worse than a *similarly situated* secular assembly or institution; in this case, Lighthouse had not shown this (1) because, as a church, it had a different effect on the availability of liquor licenses than did secular assemblies and (2) because there was no secular comparator planning a similar combination of uses (church assembly, residence, store, Bible school, etc.). The court then determined that, even if Lighthouse were similarly situated to a secular assembly that was treated better by Long Branch's land use laws, the Ordinance and the Plan survived strict scrutiny, as Long Branch had a compelling interest in promoting the economic development of the downtown; a church, with the attendant alcohol restrictions, would thwart that goal. The court further concluded that the "substantial burden" requirement of section 2(a)(1) of RLUIPA also applied to the section 2(b)(1) Equal Terms provision and that Lighthouse could not demonstrate that Long Branch's actions imposed a substantial burden on Lighthouse's exercise of religion. *Lighthouse II,* 406 F.Supp.2d at 516-19.

As for the Free Exercise Clause, the District Court held that neither the Ordinance nor the Plan violated it because both were neutral laws of general applicability. *Id.* at 519-20.

Lighthouse appealed the entry of summary judgment for Long Branch and the denial of its

motion for partial summary judgment with respect only to its Free Exercise and RLUIPA Equal Terms claims.[9]

The District Court had jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(3), 1367, and 1441, and 42 U.S.C. §§ 1983, 3612, and 2000cc-2. We have jurisdiction of the appeal under 28 U.S.C. § 1291.

We review a district court's grant of summary judgment *de novo*. *Gottshall v. Consol. Rail Corp.*, 56 F.3d 530, 533 (3d Cir.1995). Summary judgment is only appropriate if there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). In reviewing the District Court's grant of summary judgment, we view the facts in a light most favorable to the nonmoving party. *Id.* at 533.

II. Discussion

A. Mootness

As a threshold matter, Long Branch argues that Lighthouse's claims based on the Ordinance are moot because, even if the Ordinance violated RLUIPA or the Free Exercise clause, the Ordinance has now been superseded by the Plan. We have held that where a regulation is challenged as invalid on its face, "if an amendment removes those features ...

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[9] Generally, the denial of summary judgment is not a final order subject to appeal; however, it becomes so when accompanied by an order granting a cross-motion for summary judgment. *McFarland v. Miller*, 14 F.3d 912, 917 (3d Cir.1994).

being challenged by the claim, any claim for injunctive relief becomes moot as to those features." *Nextel West Corp. v. Unity Twp.*, 282 F.3d 257, 262 (3d Cir.2002).[10] Since the Plan superseded the Ordinance in all relevant respects, its enactment has mooted Lighthouse's claims for injunctive relief based on the facial invalidity of the Ordinance. Lighthouse's claims for compensatory damages and attorney fees, however, are not moot. *See Donovan v. Punxsutawney Area School Bd.*, 336 F.3d 211, 218 (3d Cir.2003) (holding that although plaintiff's claim for declaratory and injunctive relief was moot, her "damages and attorney fees claims continue[d] to present a live controversy."). We thus will allow Lighthouse's claims under the Ordinance only insofar as they are claims for compensatory damages and attorney fees.

B. RLUIPA

Before we discuss Lighthouse's constitutional claim, we will consider its statutory claim under the Equal Terms Provision, 42 U.S.C. § 2000cc(b)(1). *See Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988) ("A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.").

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[10] *Nextel* also held that if the amendment does not significantly alter the existing legislation, but leaves its objectionable features undisturbed, the claim is not moot. *Id.* As explained below, we hold here that the Plan does not contain the same objectionable features as the Ordinance.

RLUIPA is "the latest of long-running congressional efforts to accord religious exercise heightened protection from government-imposed burden, consistent with [Supreme Court] precedent." *Cutter v. Wilkinson,* 544 U.S. 709, 714, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005). The path to the enactment of RLUIPA is well documented. Congress initially enacted the Religious Freedom Restoration Act (RFRA) in 1993 to counter the Supreme Court's decision in *Employment Div., Dept. of Human Resources v. Smith,* 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), which held that neutral and generally applicable laws are not susceptible to attack under the Free Exercise Clause of the Constitution even if they incidentally burden the exercise of religion. RFRA provided that any legislation imposing a substantial burden on religion would be invalid unless it was the least restrictive means of furthering a compelling state interest. 42 U.S.C. § 2000bb *et seq.* Shortly thereafter, the Supreme Court in *City of Boerne v. Flores,* 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997), struck down RFRA as it applied to the States because it exceeded Congress's remedial power under Section 5 of the Fourteenth Amendment.

In reaction, Congress enacted RLUIPA. More limited in reach than RFRA, RLUIPA addresses only land use regulations, Section 2-42 U.S.C. § 2000cc, and the religious rights of institutionalized persons, Section 3-42 U.S.C. § 2000cc-1. The land-use section of the statute is further subdivided into two sections: Substantial Burdens, § 2000cc(a), and Discrimination and Exclusion, § 2000cc(b). These sections provide:

(a) SUBSTANTIAL BURDENS-

(1) GENERAL RULE-No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution-

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

(2) SCOPE OF APPLICATION-This subsection applies in any case in which-

(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance

...

(B) the substantial burden affects ... commerce ... among the several States ...

(C) the substantial burden is imposed in the implementation of

a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

(b) DISCRIMINATION AND EXCLUSION-

(1) EQUAL TERMS-No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

(2) NONDISCRIMINATION-No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

(3) EXCLUSIONS AND LIMITS-No government shall impose or implement a land use regulation that-

(A) totally excludes religious assemblies from a jurisdiction; or

(B) unreasonably limits religious assemblies, institutions, or

structures within a jurisdiction.

Lighthouse argues the District Court should have entered summary judgment in its favor because both the Ordinance and the Plan violate RLUIPA's Equal Terms provision on their face by allowing secular assemblies, but not religious ones, to locate in the zones they regulate. Lighthouse contends the District Court misinterpreted RLUIPA, imposing additional requirements not contemplated by the statute. It urges us to reverse the judgment of the District Court and to hold that (1) a plaintiff, advancing a claim under the Equal Terms provision, need not prove that the unequal treatment imposed a "substantial burden" on its exercise of religion; (2) the Equal Terms provision does not require the identification of a similarly situated comparator; a religious assembly need only show that the challenged land-use regulations treat *any* secular assembly better than the religious plaintiff; and (3) unlike the Substantial Burdens section, the Equal Terms provision does not provide for strict scrutiny of offending land-use regulations but rather operates under a strict liability standard, making the regulations automatically invalid. Long Branch responds that the District Court's decision was correct.

The parties substantially agree that both the Ordinance and the Plan are land use regulations within the meaning of 42 U.S.C.2000cc(b), that Lighthouse's proposed church use is use as a religious assembly, and that several of the permitted uses under both ordinances are nonreligious assemblies. The question is what else Lighthouse

must show in order to prevail.

1. Must a plaintiff in an action under RLUIPA's Equal Terms provision show that the alleged discriminatory land-use regulation imposes a "substantial burden" on its religious exercise?

The District Court held that a plaintiff raising a claim under the Equal Terms provision must show that the challenged land-use regulation imposed a "substantial burden" on its exercise of religion. We disagree because the structure of the statute and the legislative history clearly reveal that the substantial burden requirement does not apply to claims under 2(b)(1), the Equal Terms provision.

Section 2(b)(1) does not include "substantial burden" as an element; section 2(a)(1), the Substantial Burdens section, titled as such, does. Since Congress evidently knew how to require a showing of a substantial burden, it must have intended not to do so in the Equal Terms provision. *See Russello v. United States,* 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983) ("where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion").

The legislative history supports the conclusion that the Equal Terms provision does not incorporate a substantial burden requirement. In presenting the

bill for consideration, co-sponsor Senator Hatch stated RLUIPA would "ensure that if a government action substantially burdens the exercise of religion ..., the government must demonstrate that imposing the burden serves a compelling public interest and does so by the least restrictive means. *In addition,* with respect to land use regulation, the bill specifically prohibits various forms of religious discrimination and exclusion." 146 Cong. Rec. S7774 (emphasis added). Neither the House nor the Senate sponsors' analyses mention the phrase "substantial burden" in connection with the Discrimination and Exclusion section or its Equal Terms subpart. *See* 146 Cong. Rec. E 1563 and 146 Cong. Rec. S7774.

The statements by the bill's sponsors, quoted by the District Court in support of its construction of the Equal Terms provision, are not persuasive evidence of contrary legislative intent. *See Lighthouse II,* 406 F.Supp.2d at 519 (quoting 146 Cong. Rec. S7774-7776) (joint statement of Sen. Hatch and Sen. Kennedy). First, the court quoted the Senate sponsors' statement that the Equal Terms provision "enforce[s] the Free Exercise Clause against laws that burden religion and are not neutral and generally applicable." The use of the word "burden" in this context, however, is descriptive of the area at which the statute is targeted; it does not create a "substantial burden" element in the provisions of 2(b)(1). Moreover, cases interpreting the First Amendment's Free Exercise clause do not require a plaintiff, challenging a discriminatory regulation, to show that it imposes a substantial burden on plaintiff's religious exercise. *See Tenafly Eruv Ass'n v. Borough of Tenafly,* 309 F.3d 144, 170

(3d Cir.2002) ("Under *Smith* and *Lukumi*... there is no substantial burden requirement when government discriminates against religious conduct"). It follows then that there is no requirement that a statute, like the Equal Terms provision of RLUIPA, which enforces the Free Exercise clause, include such a burden as a required element of proof.

Second, the District Court relied on the statement in the legislative history that "the party asserting a violation of this Act shall in all cases bear the burden of proof that the governmental action in question constitutes a substantial burden on religious exercise." This is a commentary on RLUIPA's burden-shifting provision, which directs that "[i]f a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2000cc of this title, the government shall bear the burden of persuasion of any element of the claim" except that the plaintiff retains the burden of proof on substantial burden. 42 U.S.C. § 2000cc-2(b). This provision and the Senate sponsors' statement on it merely establish that, where substantial burden is an element of the claim, the plaintiff must prove it; they do not address when substantial burden is such an element.

Finally, the District Court cites the proposition that the Discrimination and Exclusion section "directly address[es] some of the more egregious forms of land use regulation, and provides more precise standards than the substantial burden and compelling interest tests." This statement

differentiates *between* the substantial burden test and the "more precise standards" of section 2(b). Thus, it detracts from, rather than lending support to, the District Court's construction.

The two Courts of Appeals that have interpreted RLUIPA's Equal Terms provision have agreed that a plaintiff need not show substantial burden to prevail under it. *See Konikov v. Orange County,* 410 F.3d 1317, 1327-29 (11th Cir.2005) (holding that although the zoning code at issue did not impose a substantial burden on plaintiff's religious exercise, it violated RLUIPA's equal terms provision because it was enforced in a way that treated religious organizations on less than equal terms with secular ones); *Midrash Sephardi, Inc. v. Town of Surfside,* 366 F.3d 1214, 1229-35 (11th Cir.2004) (a zoning ordinance prohibiting churches in a certain district violated RLUIPA's equal terms provision although it did not impose a substantial burden on plaintiffs); *Digrugilliers v. Consolidated City of Indianapolis,* 506 F.3d 612, 2007 WL 3151201 at *2 (7th Cir.2007); *Civil Liberties for Urban Believers v. City of Chicago,* 342 F.3d 752, 762 (7th Cir.2003) ("the substantial burden and nondiscrimination provisions are operatively independent of one another"). We now hold as well that a plaintiff challenging a land-use regulation under section 2(b)(1) of RLUIPA does not need to present evidence that the regulation imposes a substantial burden on its religious exercise.

2. Does a RLUIPA Equal Terms plaintiff need to show that it is "similarly situated" to a secular comparator that was treated better?

The District Court held that Lighthouse could not prevail on its RLUIPA Equal Terms claim because it could not identify a similarly situated nonreligious comparator. Lighthouse contends this was error and urges us to take the position that a plaintiff, asserting a violation of the Equal Terms provision, needs to show nothing more than that the challenged land-use regulation treats one or more nonreligious assemblies or institutions better than a religious assembly or institution, without regard for the objectives of the regulation or the characteristics of the secular and religious comparators. We conclude that the District Court was correct in construing RLUIPA's Equal Terms provision to require a plaintiff to do something more than identify *any* nonreligious assembly or institution that enjoys better terms under the land-use regulation. Nevertheless, we find that the court erred in requiring the religious plaintiff to point to a secular comparator that proposes the same combination of uses. As we will explain, what the Equal Terms provision does in fact require is a secular comparator that is similarly situated as to the regulatory purpose of the regulation in question-similar to First Amendment Free Exercise jurisprudence.

It is undisputed that, when drafting the Equal

Terms provision, Congress intended to codify the existing jurisprudence interpreting the Free Exercise Clause. *See* 146 Cong. Rec. S7774 (July 27, 2007) (Senate Sponsors' statement) (sections 2(b)(1) and (b)(2) "enforce the Free Exercise rule against laws that burden religion and are not neutral and generally applicable"). Under Free Exercise cases, the decision whether a regulation violates a plaintiff's constitutional rights hinges on a comparison of how it treats entities or behavior that have the same *effect* on its objectives.

As the Supreme Court held in *Smith,* regulations that are neutral and of general applicability are presumptively valid under the Free Exercise clause even if they impose an incidental burden on the exercise of religion. *Smith,* 494 U.S. at 878-79, 110 S.Ct. 1595. A regulation does not automatically cease being neutral and generally applicable, however, simply because it allows certain secular behaviors but not certain religious behaviors. The impact of the allowed and forbidden behaviors must be examined in light of the purpose of the regulation. In addition, when a government permits secular exemptions to an otherwise generally applicable government regulation, the Free Exercise Clause requires that the government accord equal treatment to religion-based claims for exemptions that would have a similar impact on the protected interests.

The Supreme Court's opinion in *Lukumi* makes this point clear. That case involved a challenge by practitioners of the Santeria religion to a series of city ordinances prohibiting the animal

sacrifices that are part of Santeria rituals. The Supreme Court held that the ordinances, taken together, were neither neutral nor generally applicable, but rather had been "gerrymandered" to prohibit almost exclusively the religious sacrifice of animals; none of the city's aims in enacting the ordinances (preventing cruelty to animals and limiting the health risks caused by improper disposal of animal carcasses and consumption of uninspected meat) could warrant prohibiting the killing of animals in religious rituals while allowing, among other secular activities, hunting, fishing and the use of rabbits to train greyhounds. *Lukumi,* 508 U.S. at 536-37, 113 S.Ct. 2217. Focusing specifically on a zoning ordinance that prohibited the slaughter of animals outside the areas zoned for slaughterhouses, the Court pointed out that it made an exception for "any person, group, or organization that slaughters or processes for sale, small numbers of hogs and/or cattle per week" and remarked that the city had "not explained why commercial operations that slaughter small numbers of hogs and cattle do not implicate its professed desire to prevent cruelty to animals and preserve the public health." *Id.* at 545, 113 S.Ct. 2217 (internal quotation marks omitted). Thus, the reason the ordinance was suspect was not merely because it allowed secular versions of the religious behavior it prohibited, but because both behaviors impacted the city's declared goals in the same way. The unequal treatment of equally detrimental behaviors is what caused the violation of the Free Exercise clause.

This Court's Free Exercise opinions in *Fraternal Order of Police v. City of Newark,* 170 F.3d

359 (3d Cir.1999), *Tenafly,* 309 F.3d 144, and *Blackhawk v. Pennsylvania,* 381 F.3d 202 (3d Cir.2004), confirm that we have consistently understood Free Exercise analysis to include an examination of the comparators' relation to the aims of the regulation. First, in *Fraternal Order of Police,* we examined a challenge by Muslim police officers against the Newark Police Department's requirement that they shave beards that they wore for religious reasons. The declared aim of the Department's no-beard policy was to impose a uniform look on its police force. *Id.* at 366. The policy exempted two classes of individuals: undercover officers and uniformed officers who wore beards for medical reasons. We held that the medical exemption made the regulation subject to heightened scrutiny under the Free Exercise Clause because it "indicate[d] that the Department ha[d] made a value judgment that secular (i.e., medical) motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not." *Id.* Importantly, however, we also made it clear that the policy's other categorical exemption, for undercover officers, did not raise Free Exercise concerns. The Department clearly had no interest in making its *undercover* officers easily identifiable as police, and thus that exception did not "undermine the Department's interest in uniformity." *Id.*

Similarly, we held in *Tenafly* that the township's selective enforcement of its prohibition against affixing signs to utility poles suggested "a discriminatory intent" because the township routinely allowed, among other things, house number

signs, orange ribbons supporting one position in a controversy over school regionalization, and directional signs bearing crosses to show the location of churches, but it denied permission to an Orthodox Jewish group to affix lechis, religiously significant items, to the poles. *Tenafly,* 309 F.3d at 165-167. Again, however, we were careful to note that not *all* exceptions to the facially neutral rule were troublesome, only the ones that bore the same relation to the purposes of the regulation, *i.e.*, preventing clutter, as did the prohibited lechis. Thus, the Borough of Tenafly's exception for cable and telephone wires did not make the regulation any less neutral or generally applicable because "utility poles exist to facilitate telecommunications" and therefore "utility wires are obviously unlike any of the other materials [Tenafly had] allowed people to affix to the poles." *Id.* at 168 n. 29.

The same principle held true in *Blackhawk.* There, we examined the Commonwealth of Pennsylvania's refusal to waive a wildlife permit fee for a Native American who kept two bears for religious reasons although the statute contained categorical waivers for zoos and "nationally recognized circuses." *Blackhawk,* 381 F.3d. at 211. In holding that the statute violated the Free Exercise clause, we focused on the fact that categorical waivers for circuses and zoos-exemptions intended to "serve the Commonwealth's interest in promoting commerce, recreation, and education" and which "undermine the interests served by the fee provision to at least the same degree as would a [religious] exemption"-were available, but the Commonwealth refused to extend an individual religious waiver,

which would have served "these or analogous interests." *Id.*

We see that the Free Exercise jurisprudence of the Supreme Court and of this Court teaches that the relevant comparison for purposes of a Free Exercise challenge to a regulation is between its treatment of certain religious conduct and the analogous secular conduct that *has a similar impact on the regulation's aims.* In each case, a regulation's preferential treatment of secular behavior that did not affect the regulation's purpose in the same way as the prohibited religious behavior did not raise Free Exercise concerns. Heightened scrutiny was warranted only when a principled distinction could not be made between the prohibited religious behavior and its secular comparator in terms of their effects on the regulatory objectives.

Thus, the District Court was correct in holding that the relevant analysis under the Equal Terms provision of RLUIPA must take into account the challenged regulation's objectives: a regulation will violate the Equal Terms provision only if it treats religious assemblies or institutions less well than secular assemblies or institutions that are similarly situated *as to the regulatory purpose.* There is no need, however, for the religious institution to show that there exists a secular comparator that performs the same functions. For that reason, the District Court erred in focusing on Lighthouse's inability to identify a secular comparator with a similar range of

uses.[11]

To support its position that a RLUIPA Equal Terms plaintiff does not need to identify a comparator, however, Lighthouse relies on the opinion of the Eleventh Circuit Court of Appeals in *Midrash Sephardi,* 366 F.3d 1214, and the recent Seventh Circuit Court of Appeals decision following it, *Vision Church, United Methodist v. Village of Long Grove,* 468 F.3d 975 (7th Cir.2006). Nevertheless, we agree with Long Branch, the District Court, and the United States (which appeared as *amicus curiae* in this case) that we should decline this invitation to adopt the Eleventh Circuit's expansive reading of the statute.

In *Midrash Sephardi,* two Orthodox Jewish

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[11] Because we construe the statute to conform to the contours of Free Exercise jurisprudence with respect to this aspect, we need not reach the question whether Congress would have exceeded its powers under Section 5 of the Fourteenth Amendment, under which the Equal Terms provision is enacted, by mandating maximum-possible favorable treatment for religious institutions without regard for legitimate governmental objectives. *See City of Boerne,* 521 U.S. at 519, 117 S.Ct. 2157 (Congress may use its power under Section 5 to enforce the rights guaranteed by the First Amendment, but may use its power only to "enforce" a constitutional right, not to substantively alter it. "Legislation which alters the remedy of the Free Exercise Clause cannot be said to be enforcing the Clause.")

Because we limit the statute in this way, we are not concerned about Congress's authority under Section 5 to impose what amounts to a strict liability standard on regulations that violate the Equal Terms provision. The dissent, however, does not limit its interpretation of section 2(b)(1) to Free Exercise jurisprudence and for that reason we doubt the viability of the dissent's interpretation. *See* footnote 14 *infra.*

synagogues challenged a zoning scheme which, like the one at issue here, prohibited churches and synagogues within the Town of Surfside's two-block business district while allowing theaters, restaurants, private clubs, and other secular uses. Surfside defended the zoning ordinance on the basis of its need to "invigorate the business district and ... create a strong tax base through its retail district." *Id.*, 366 F.3d at 1221. The District Court concluded that the ordinance did not violate RLUIPA because the permitted secular assemblies and institutions were not similarly situated to churches and synagogues: "private clubs provid[e] more of a social setting [and] provide more synergy for the shopping district in keeping with the purpose of [the ordinance]." *Id.* at 1230 (quoting *Midrash Sephardi v. Surfside,* No. 99-1566-CIV, 2000 U.S. Dist. LEXIS 22629, at *32-33 (S.D.Fla. July 13, 2000) (*Midrash Sephardi I*)). In reaching this conclusion, the District Court relied on Justice Harlan's "natural perimeter" test, developed in *Walz v. Tax Comm'n,* 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970), under which a regulation is considered neutral and presumptively valid under the religious clauses of the First Amendment if its "circumference ... encircles a class so broad that it can be fairly concluded that religious institutions could be thought to fall within the natural perimeter." *See Walz,* 397 U.S. at 696, 90 S.Ct. 1409 (Harlan, J., concurring).

The District Court reasoned, in the case of the Surfside ordinance, that the regulation generally allowed uses that would advance its aims while prohibiting a varied group of uses, including "churches, synagogues, educational or philanthropic

institutions (including museums), parking lots and garages, public and governmental buildings and public utility/public service uses." *Midrash Sephardi I,* 2000 U.S. Dist. LEXIS 2262 at *31.

The Court of Appeals for the Eleventh Circuit disagreed with the District Court's reasoning. It concluded that RLUIPA's plain language provided the statute's own definition of the "natural perimeter" for a valid land-use regulation, namely, "the category of 'assemblies or institutions.' "[12] *Id.* In other words, according to the Eleventh Circuit, all assemblies and institutions "travel" together under RLUIPA: if a zoning regulation allows a secular assembly, all religious assemblies must be permitted. *See id.* at 1230-31.[13] *See also Vision Church,* 468

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[12] The court looked simply to the dictionary for a definition of "assembly" as "a company of persons collected together in one place and usually for some common purpose (as deliberation and legislation, worship, or social entertainment)" and "institution" as "an established society or corporation: an establishment or foundation esp[ecially] of a public character," *id.* at 1230, quoting Webster's 3d New Int'l Unabridged Dictionary 131, 1171 (1993).

[13] Having created this broad scope for "equal terms," the *Midrash Sephardi* court then incorporated the *Smith-Lukumi* line of precedent, requiring strict scrutiny to determine if the ordinance was in fact neutral and generally applicable, concluding it was not, first because both overinclusive and underinclusive with respect to its goals of spurring commercial development in the business district and second because the documents showed the motivations for the synagogues' activities played a role in the town's thinking. *Id.* at 1233-35. We prefer, however, to interpret section 2(b)(1)'s "equal terms" as directed to "similarly situated" comparators in regard to the regulatory purpose of the ordinance, see *supra,* and to reject the

F.3d 975, 1003 (holding that a plaintiff making a claim under RLUIPA section 2(b)(1) need not identify a nonreligious comparator that is "similarly situated in all relevant respects"). *But see Konikov,* 410 F.3d 1317 (limiting *Midrash Sephardi* to facial challenges and holding that a similarly situated secular comparator must be identified for as-applied challenges).

We are not persuaded by the reasoning of the Eleventh Circuit. Its reading of the statute would lead to the conclusion that Congress intended to force local governments to give any and all religious entities a free pass to locate wherever any secular institution or assembly is allowed. Thus, under the Eleventh Circuit's interpretation, if a town allows a local, ten-member book club to meet in the senior center, it must also permit a large church with a thousand members-or, to take examples from the Free Exercise caselaw, it must permit a religious assembly with rituals involving sacrificial killings of animals or the participation of wild bears-to locate in the same neighborhood regardless of the impact such a religious entity might have on the envisioned

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Midrash-Sephardi court's adoption of a broad scope comparator and its addition of a "strict scrutiny" element to be incorporated into RLUIPA § 2b(1), *see* Part II.B.3 *supra*. As we conclude in Part II.B.3, the incorporation of "strict scrutiny" into section 2(b)(1) is inconsistent with its express language. We surmise that the *Midrash-Sephardi* court required a strict scrutiny examination in order that its holding conform to existing Free Exercise case law-see footnote 11 *supra*. However, we believe that, unlike the *Midrash-Sephardi* court, we have come to a constitutionally acceptable interpretation of section 2(b)(1), following its express terms, without incorporating additional terms into it.

character of the area. *See Lukumi,* 508 U.S. at 520, 113 S.Ct. 2217; *Blackhawk,* 381 F.3d 202. We believe this result would be contrary to the text of the statute and to the expressed intent of Congress. We conclude instead that a religious plaintiff under the Equal Terms Provision must identify a better-treated secular comparator that is similarly situated in regard to the *objectives* of the challenged regulation.

3. Should RLUIPA's 2(b)(1) be read as requiring strict scrutiny?

The final issue of statutory construction before us is whether the Equal Terms provision should incorporate a required strict scrutiny analysis of a regulation that treats a religious assembly or institution on less than equal terms with similarly situated nonreligious assemblies or institutions. We hold that RLUIPA's Equal Terms provision operates on a strict liability standard; strict scrutiny does not come into play.

Our analysis of whether strict scrutiny applies to the Equal Terms provision is informed by our discussion of whether a plaintiff under this provision must show a "substantial burden," *supra.* The land-use provisions of RLUIPA are structured to create a clear divide between claims under section 2(a) (the Substantial Burdens section) and section 2(b) (the Discrimination and Exclusion section, of which the Equal Terms provision is a part). Since the Substantial Burden section includes a strict scrutiny provision and the Discrimination and Exclusion section does not, we conclude this "disparate exclusion" was part of the intent of Congress and not

an oversight. *See Russello,* 464 U.S. at 23, 104 S.Ct. 296.

In reaching this conclusion, we again must part ways with the Eleventh Circuit, which has held that "a violation of the Equal Terms provision is not necessarily fatal to the land use regulation" but must " 'undergo strict scrutiny.' " *Primera Iglesia Bautista Hispana of Boca Raton,* 450 F.3d 1295, 1308 (11th Cir.2006) (quoting *Midrash Sephardi,* 366 F.3d at 1232). The Eleventh Circuit grounded this conclusion on the observation that, according to legislative history, "RLUIPA's equal terms provision codifies the *Smith-Lukumi* line of [Free Exercise] precedent," which imposes strict scrutiny "where a law fails to similarly regulate secular and religious conduct implicating the same government interests." *Midrash Sephardi,* 366 F.3d at 1232. As discussed at length above, we give deference to Congress's intent to codify the Free Exercise jurisprudence. In that regard, however, we find that Congress clearly signaled its intent that the operation of the Equal Terms provision *not* include strict scrutiny by the express language of sections 2a(1) and 2b(1) and by incorporating the element of Free Exercise case law, as can be seen in the language "equal terms," that requires a determination that there is a secular comparator as to the objectives of the challenged regulation, *see Lukumi,* 508 U.S. at 536-37, 113 S.Ct. 2217. Thus we decline to follow the Eleventh Circuit's reasoning. We hold instead that, if a land-use regulation treats religious assemblies or institutions on less than equal terms with nonreligious assemblies or institutions that are no less harmful to the governmental objectives in

enacting the regulation, that regulation-without more-fails under RLUIPA.[14]

Similarly, our concern with the dissent is that it formulates an equally boundless definition of "assembly" as did the *Midrash-Sephardi* court, but then the dissent requires no substantial burden, no strict scrutiny and no limitation on the secular comparator. This expansive reading of section 2(b)(1), in our opinion, goes beyond existing free exercise jurisprudence and as such would render section 2(b)(1) unconstitutional by creating a substantively altered right not heretofore cognizable in Free Exercise jurisprudence. *See City of Boerne*, 521 U.S. at 519, 117 S.Ct. 2157.

4. Did the District Court err in granting summary judgment for Long Branch on the RLUIPA Equal Terms claims?

We have construed the RLUIPA Equal Terms section to include neither a substantial burden nor a strict scrutiny requirement. What the Equal Terms section does require is that the plaintiff show that it was treated less well than a nonreligious comparator that had an equivalent negative impact on the aims

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[14] With our definition of comparator as a secular assembly that has a similar impact as a religious assembly on the regulation's aims, we are putting the teeth into section 2(b)(1) that it needs to follow Free Exercise case law. It is because the *Midrash-Sephardi* court defined "comparator" so broadly-despite the "equal terms" language of section 2(b)(1)-that, in order to conform to Free Exercise jurisprudence, the court had to create a "strict scrutiny" element in section 2(b)(1).

of the land-use regulation. In sum, a plaintiff asserting a claim under the RLUIPA Equal Terms provision must show (1) it is a religious assembly or institution, (2) subject to a land use regulation, which regulation (3) treats the religious assembly on less than equal terms with (4) a nonreligious assembly or institution (5) that causes no lesser harm to the interests the regulation seeks to advance. *Cf. Primera Iglesia Bautista,* 450 F.3d at 1307 (enumerating elements 1-4 as the requirements of a RLUIPA section 2(b)(1) cause of action). We must now determine under this analytical framework whether the District Court correctly decided that Long Branch was entitled to summary judgment on Lighthouse's Equal Terms claims with regard to both the Ordinance and the Plan.

(i) The Plan

We begin, out of chronological order, with the Plan. The Plan allows non-religious assemblies such as theaters, cinemas, performance art venues, restaurants, bars and clubs, culinary schools, and dance studios, but not any non-listed uses, including churches and synagogues. Thus the question is whether the exclusion of churches and religious assemblies from the Broadway Corridor treats the churches on less than equal terms with nonreligious assemblies or institutions whose presence would cause no lesser harm to the redevelopment and revitalization of the Corridor. We conclude that it does not.

Long Branch's goal in adopting the Plan is well documented-it was to "achieve redevelopment of

an underdeveloped and underutilized segment of the City." Long Branch's hope is for the "Broadway Corridor" to become a core "sustainable retail 'main' street" that will anchor a "vibrant" and "vital" downtown residential community. Long Branch argues that churches are by their nature not likely to foster the kind of extended-hours traffic and synergetic spending it wishes to foster in the Broadway Corridor and that churches are different from the allowed secular assemblies because, by operation of a New Jersey statute prohibiting the issuance of liquor licenses in the vicinity of houses of worship, permitting churches into the Broadway Corridor would hinder the development of the kind of modern entertainment-oriented district that Long Branch envisages. *See* N.J.S.A. 33:1-76 (with the exception of certain "grandfathered" establishments, "no license shall be issued for the sale of alcoholic beverages within two hundred feet of any church or public schoolhouse or private schoolhouse not conducted for pecuniary profit").

We do not need to reach the question whether a church by its very nature is unlikely to contribute to the development of a "vibrant" and "vital" downtown community centered on an entertainment and retail district. We agree with Long Branch that churches are not similarly situated to the other allowed assemblies with respect to the aims of the Plan where, by operation of a state statute, churches would fetter Long Branch's ability to allow establishments with liquor licenses into the Broadway Corridor. It would be very difficult for Long Branch to create the kind of entertainment area envisaged by the Plan-one full of restaurants,

bars, and clubs-if sizeable areas of the Broadway Corridor were not available for the issuance of liquor licenses.[15]

Lighthouse, with the support of *amici* Association of Christian Schools International and the General Conference of Seventh-Day Adventists, argues that the existence of the New Jersey statute is not dispositive for three reasons. First, Lighthouse has offered to waive its rights under it in perpetuity; second, a State cannot "immunize" itself against a constitutional duty by artificially creating a distinction that it can then invoke to justify disparate treatment; and, third, Long Branch admitted that it had not actually conducted any studies to determine if churches would have a negative impact.

Long Branch responds that a waiver would be ineffective because it would have to be renewed at every license renewal or transfer. Long Branch is

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[15] We note that the Seventh Circuit Court of Appeals in its recent decision in *Digrugilliers*, 506 F.3d 612, 615, 2007 WL 3151201 at *3, interpreting the Equal Terms provision of section 2(b)(1), held that government "cannot, by granting churches special privileges [Indiana law forbids the sale of liquor within 200 feet of a church] ..., furnish the premise for excluding churches from otherwise suitable districts." We do not so easily dismiss N.J.S.A. 33:1-76, the New Jersey statute barring liquor licenses within 200 feet of a church. The statute was enacted many years ago-not to discriminate against churches, but to favor them. We point out also that the New Jersey statute bars liquor licenses within 200 feet of a non-profit "schoolhouse," an another type of assembly which is not permitted in the Redevelopment District.

correct. Under N.J.S.A. 33:1-76.2, if a church annually waives its protection under the statute with respect to a license for 15 years, the holder of the license can apply for renewal "without further or renewed authority, or waiver, of the church of the school." Every new licensee, however, would require a new waiver. This could cause confusion and might give the church unacceptable control over the development of the downtown area. In addition, even if a perpetual waiver were practically possible, in order to act neutrally toward all potential religious applicants, Long Branch could not simply grant Lighthouse an exemption. It would have to amend the regulation to allow *all* religious institutions to establish themselves within the relevant zones on the condition that they waive their rights under the law. It is not inconceivable that such a requirement would interfere with a potential applicant's religious tenets and cause Long Branch impermissibly to entangle itself in an individual religious institution's exercise of religion.[16]

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[16] Similarly, Lighthouse argues that it is, in fact, the kind of church that would have a positive impact on the kind of downtown district Long Branch is trying to create because its Pentecostal services are "upbeat" and because it would hold several services a day, including late at night. Rev. Brown testified he would want to use the building "24 and 7," and place a storefront religious retail store there. The city planner conceded that the presence of a retail store would make the church "more compatible" with its retail neighbors. However, for Long Branch to allow Lighthouse an exemption because of the "upbeat" nature of its services and their frequency, as well as Lighthouse's willingness to engage in commercial activities, is to risk discriminating *between* religious uses in order to avoid potential discrimination *against* religious uses. *See Larson v. Valente*, 456 U.S. 228, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982)

Lighthouse's second argument is equally unpersuasive. On its face, the alcohol-free-zone law was enacted to *favor* churches, not to *disfavor* them. Although its effect in this context is to handicap religious institutions, it cannot be said that the Plan and the New Jersey statute, taken together, suggest improper motives. Indeed, we have no concern about the earnestness of Long Branch's intent with the Plan. The Plan allows only the kind of assemblies that are likely to further its goal-theaters, cinemas, and performing arts centers, but not, for example, strip clubs. The allowed uses are establishments that generate relatively high income and encourage visitors to linger in the downtown area into the evening. In addition, the Plan exhibits internal consistency by not allowing schools-under the New Jersey statute non-profit "schoolhouses" would trigger the same restrictions as churches on the availability of liquor licenses. *See* N.J.S.A. 33:1-76.

Finally, we are not persuaded by Lighthouse's argument that Long Branch failed to present any evidence that the unavailability of liquor licenses would detrimentally affect its plans for a "vibrant" and "vital" downtown centered on a high-traffic, extended-hours retail and entertainment district.

(invalidating a state statute that regulated the solicitation of donations by charitable organizations if, but only if, the organization solicited more than 50% of its funds from nonmembers: the statute "created a denominational preference because the burdens of the regulation clearly discriminated against religious organizations that were significantly involved in fund raising activities aimed at nonmembers.") We do not believe Long Branch must run this risk.

Although there may be room for disagreement over Long Branch's prioritizing of the availability of alcohol consumption over the ability to seek spiritual enlightenment, it is clear that Long Branch could not create a downtown area where restaurants, clubs, bars, retail and entertainment facilities synergize if Long Branch could not issue liquor licenses throughout that area.

Thus, we agree with the District Court that Long Branch is entitled to summary judgment on Lighthouse's RLUIPA claim as regards the Plan because Lighthouse has placed no evidence in the record that the Plan treats a religious assembly on less than equal terms with a secular assembly that would cause an equivalent negative impact on Long Branch's regulatory goals.

(ii) The Ordinance

We reach a different result with respect to the Ordinance. Unlike the Plan, the Ordinance's aims are not well documented. The Ordinance permitted a range of different uses in the Central Commercial District, including a restaurant, variety store and other retail store, educational service and college, "Assembly hall, bowling alley, and motion picture theater," governmental service, municipal building, new automobile and boat showroom, and "High Technology-Light Industrial." Among the uses permitted upon issuance of a conditional use permit were motor vehicle service station and public utility.

Although it appeared to us in *Lighthouse I* that the Ordinance, on its face, might allow all forms

of assembly under the "Assembly Hall" category, later discovery clarified that Long Branch's construction of the term "Assembly Hall" did not include use as a religious assembly. *Cf. Lighthouse I*, 100 Fed Appx. at 74-75. Because there is nothing in the record describing Long Branch's objectives for the Central Commercial District under the Ordinance and because it is not apparent from the allowed uses why a church would cause greater harm to regulatory objectives than an "assembly hall" that could be used for unspecified meetings, the District Court erred in granting summary judgment to Long Branch on this claim. Rather, Lighthouse is entitled to summary judgment in its favor because Long Branch has failed to create a genuine issue of material fact as to whether the Ordinance treated religious assemblies or institutions on less than equal terms with non-religious assemblies or institutions that caused equivalent harm to its governmental objectives. We will therefore remand this claim to the District Court to enter summary judgment for Lighthouse and to determine compensatory damages for the period between Lighthouse's application for a waiver as a church and the enactment of the Plan. The District Court may also, at its discretion, award appropriate attorney fees. *See* 42 U.S.C. § 1988(b). Since Lighthouse's claim for injunctive relief under the Ordinance is moot, however, only monetary relief is available to it.

C. Free Exercise Clause

Because we have held that Long Branch is entitled to summary judgment on its claim based on the invalidity of the Ordinance under RLUIPA, we do

not reach the question whether it is also invalid under the Free Exercise Clause. *See Lyng*, 485 U.S. at 446, 108 S.Ct. 1319 (a court should not reach a constitutional issue unless a decision on the constitutional question could entitle plaintiff to relief beyond what is available to him on his statutory claims). However, since we have affirmed the District Court's grant of summary judgment to Long Beach on its claim that the Plan does not violate RLUIPA, we now turn to the question whether the Plan violates Lighthouse's constitutional right to free exercise of religion. We conclude that the District Court did not err in granting summary judgment to Long Branch because (1) Lighthouse has not presented any evidence that being barred from a small area in downtown Long Branch is actually a restriction on its religious exercise, as opposed to a simple economic inconvenience; and (2) even if Lighthouse had alleged a constitutionally cognizable burden on its religious exercise, the Plan is a neutral regulation of general applicability subject only to rational basis review, which it survives.

1. Has Lighthouse Placed Evidence in the Record That Long Branch's Redevelopment Plan Burdens Its Free Exercise of Religion?

The First Amendment prohibits Congress from enacting any laws "respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. The Free Exercise Clause applies to states and local governments through the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S.Ct. 900, 84 L.Ed. 1213 (1940).

The right to free exercise of religion is "first and foremost, the right to believe and profess whatever religious doctrine one desires." *Smith,* 494 U.S. at 877, 110 S.Ct. 1595. Because religious exercise often involves conduct, prohibiting that conduct is equivalent to prohibiting the free exercise of religion:

> the exercise of religion often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation. It would be true, we think (though no case of ours has involved the point), that a State would be "prohibiting the free exercise [of religion]" if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display.

Id. at 878, 110 S.Ct. 1595.

However, unlike RLUIPA, which explicitly defines as religious exercise: "The use, building, or conversion of real property for the purpose of religious exercise," the Free Exercise Clause does not define land use as a religious exercise. *Cf.* 42 U.S.C.2000cc-5(7)(B). Indeed, several sister circuits have held that, when the plaintiff does not show that locating its premises in a particular location is important in some way to its religion and the area

from which plaintiff's building is excluded is not large, there is no constitutionally cognizable burden on free exercise. *See Grace United Methodist Church v. City of Cheyenne,* 451 F.3d 643, 654 (10th Cir.2006) (inability on the part of a church to open a day care center in a particular district did not constitute "more than an incidental burden on religious conduct"); *Messiah Baptist Church v. County of Jefferson,* 859 F.2d 820, 824-25 (10th Cir.1988) ("[a] church has no constitutional right to be free from reasonable zoning regulations nor does a church have a constitutional right to build its house of worship where it pleases"; it did not matter that the zoning regulations at issue had the incidental effect of making the church's exercise of religion more expensive because it was compelled to build elsewhere in the county); *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood,* 699 F.2d 303, 306-07 (6th Cir.1983) (where construction of building for worship had no ritualistic significance, a zoning ordinance prohibiting its erection in a residential district did not impose a substantial burden on the exercise of religion); *but see Islamic Ctr. of Miss., Inc. v. City of Starkville,* 840 F.2d 293, 298-99 (5th Cir.1988) (enforcement of zoning laws making the only mosque in town relatively inaccessible by believers without cars was an undue burden on religious practice). We join these courts in holding that, when a religious plaintiff makes a Free Exercise challenge to a zoning regulation, it must explain in what way the inability to locate in the specific area affects its religious exercise.[17]

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[17] Two other courts have held similarly, but on the

Here, Lighthouse has not placed any evidence in the record that the inability to locate its premises at the Property or within the specific zoning district at issue here would negatively affect its ability to practice its religion. Although it states its mission is to minister to the downtown poor, it does not allege a sincerely held religious belief that it must minister within the Broadway Corridor or that the downtown poor are not equally accessible in nearby areas. Indeed, Rev. Brown agreed at his deposition that he "could move four blocks and still serve the population [he was] concerned about."

We emphasize that, in requiring a plaintiff who asserts a Free Exercise challenge to a land-use regulation to articulate a reason why the inability to occupy a particular location is significant to its belief, we remain cognizant of the Supreme Court's admonition that "courts must not presume to

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basis of an analysis of the magnitude of the burden rather than strictly of its nature. *See Christian Gospel Church, Inc. v. City and County of San Francisco,* 896 F.2d 1221, 1224 (9th Cir.1990) (no substantial burden on a church that claimed home worship was part of the tenets of its religion, since it was undisputed that the church, prior to applying for a permit for church use in a residential area, had worshipped in the banquet room of a hotel, and where the ordinance did not prohibit worship in all homes, only in the particular home wished by the church); *Grosz v. City of Miami Beach,* 721 F.2d 729, 739 (11th Cir.1983) (where plaintiff, head of an Orthodox Jewish sect, could have held prayer meetings in a differently zoned district four blocks from his home, the burden on his right to exercise his religion was "toward the lower end of the spectrum" although it might entail some impact in terms of "convenience, dollars or aesthetics").

determine the place of a particular belief in a religion...."*Smith*, 494 U.S. at 887, 110 S.Ct. 1595. *See also Hernandez v. Comm'r*, 490 U.S. 680, 699, 109 S.Ct. 2136, 104 L.Ed.2d 766 (1989) ("[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds.") While we do not require a plaintiff to show the burden is *substantial* because we eschew intrusion into the religious realm, we do expect a plaintiff to articulate why it is a burden *on its religious exercise* (as opposed, for instance, to its pocketbook or its convenience). *See Braunfeld v. Brown*, 366 U.S. 599, 606-7, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961) (holding that a Sunday-closing law did not burden the exercise of religion by Orthodox Jewish merchants since requiring "some financial sacrifice" from believers is not of the same order as making a religious practice unlawful in itself.)

This requirement is in line with our holding in *DeHart v. Horn*, 227 F.3d 47, 51 (3d Cir.2000) (en banc) that the two prerequisites for finding that a religious practice is entitled to protection are that "the beliefs avowed are (1) sincerely held, and (2) religious in nature, in the claimant's scheme of things." While we do not question that the act of assembling for prayer or worship is religious in nature, we do not assume, without any allegation in this sense on the part of the plaintiff, that obtaining use of the particular property at issue here has any religious significance. This alone would be reason to affirm the District Court's grant of summary judgment to Long Branch on the Free Exercise claim.

2. Is the Redevelopment Plan a Neutral Law of General Applicability?

Even if Lighthouse were able to show that the Plan burdened its free exercise of religion in a constitutionally cognizable way, the Plan would be subject to strict scrutiny only if it were not a neutral, generally applicable law. *Smith,* 494 U.S. at 878-79, 110 S.Ct. 1595. *See also San Jose Christian College v. City of Morgan Hill,* 360 F.3d 1024, 1031 (9th Cir.2004) (neutrality and general applicability analysis is appropriate with respect to zoning ordinances as well as other kinds of regulations.) We hold that it is neutral and generally applicable.

A law is not neutral if it has as its "object ... to infringe upon or restrict practices because of their religious motivation." *Lukumi,* 508 U.S. at 533, 113 S.Ct. 2217. A law is not generally applicable when it "proscribes particular conduct only or primarily when religiously motivated." *Tenafly,* 309 F.3d at 165.

The Plan is clearly neutral; there is no evidence that it was developed with the aim of infringing on religious practices, and, unlike the ordinances examined in *Lukumi* which allowed animal killing for a number of secular reasons but not as part as a religious ritual, it does not reveal a value judgment that religious reasons for assembling are less important than secular reasons. *See Lukumi,* 508 U.S. at 537-38, 113 S.Ct. 2217.

Lighthouse argues, however, that the Redevelopment Plan is not generally applicable for two reasons: first, because it allows categorical exemptions for secular, but not religious, conduct, and, second, because it allows individualized, discretionary exemptions to its general rule.

Lighthouse's position is not persuasive. In order even to frame the analysis in these terms, one would have to understand the Plan as announcing a general rule of "no assemblies" (or perhaps "no occupancy of any kind") which is then immediately undermined by the grant of numerous secular exemptions. The relevant question is whether the local government pursued its aims evenhandedly, generally allowing the kinds of uses that would further the legislative goals and prohibiting the uses that would interfere with them. This is consistent with the Free Exercise jurisprudence of the Supreme Court and of this Court.

So considered, the Plan is generally applicable despite its allowance of certain categories of secular assemblies because, as explained above, its prohibition applies evenly to all uses that are not likely to further Long Branch's goal of a revitalized, "vibrant" and "vital" downtown. In this sense the Plan is not at all like the web of ordinances the Supreme Court held unconstitutional in *Lukumi*. Here, in addition to churches, the Plan does not allow some of the most important forms of civil assembly: government buildings (which would be unlikely to generate the late-hours traffic Long Branch wishes to encourage) and schoolhouses

(which would be subject to the 200-foot liquor-license-free zone). The uses it does allow-restaurants, theaters, bars, clubs, retail shops-are likely to further its aims, not harm them.

We equally decline to hold that every zoning ordinance that includes a waiver or amendment provision is, solely by virtue of that fact, unconstitutional unless it can survive strict scrutiny, as this does not reflect existing precedent of the Supreme Court or of this Circuit and would be untenable as a practical matter.

In arguing that the presence of an amendment procedure subjects the Plan to strict scrutiny, Lighthouse quotes our statement in *Blackhawk* that "a law must satisfy strict scrutiny if it permits individualized, discretionary exemptions because such a regime creates the opportunity for a facially neutral and generally applicable standard to be applied in practice in a way that discriminates against religiously motivated conduct." *Blackhawk,* 381 F.3d at 209 (internal citations omitted.) It is true that in *Blackhawk* we summarized the rule in these terms; however, this formulation is perhaps an overstatement.

The significance for Free Exercise purposes of whether a law includes a system of individualized exemptions can be traced back to the Supreme Court's opinion in *Smith.* There, the Court distinguished a generally applicable criminal statute from the kinds of unemployment benefits determinations at issue in earlier Free Exercise cases by noting that "the 'good cause' standard

[embodied in the unemployment benefits rules] created a mechanism for individualized exemption," i.e., a system of "individualized assessment of the *reason* for the relevant conduct," then stated that its "decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason." *Smith,* 494 U.S. 872 at 884, 110 S.Ct. 1595, 108 L.Ed.2d 876 (emphasis added). What makes a system of individualized exemptions suspicious is the possibility that certain violations may be condoned when they occur for secular reasons but not when they occur for religious reasons. In *Blackhawk,* it was not the mere existence of an exemption procedure that gave us pause but rather the fact that the Commonwealth could not coherently explain what, other than the religious *motivation* of Blackhawk's conduct, justified the unavailability of an exemption. *See Blackhawk,* 381 F.3d at 211.

We are persuaded by the Tenth Circuit's approach to this issue. In *Grace United Methodist Church,* 451 F.3d 643, the court held that "although zoning laws may permit some individualized assessment for variances, they are generally applicable if they are motivated by secular purposes and impact equally all land owners in the city seeking variances." *Id.* at 651. A zoning ordinance including a provision that certain enumerated uses "may be permitted by the board" was nonetheless a neutral law of general applicability, where (1) there was no evidence that "the ordinance was passed due to religious animus," (2) there was no evidence that

the regulation was discriminatorily enforced against religious institutions, and (3) there was no evidence that the ordinance "devalue[d] religious reasons by judging them to be of lesser import than nonreligious reasons." *Id.* at 653-54, 655.

The application of the Tenth Circuit's test to Long Branch's Plan confirms that the existence of an amendment procedure does not make the Plan less than generally applicable. Although the guidelines for amendment are somewhat vague, requiring a two-level review and the final production of an "ordinance [that] shall specify the relationship of the proposed changes or amendments to the City Master Plan and the goals and objectives of the Redevelopment Plan," Long Branch has identified a procedure that does not involve a value judgment on the reason for the amendment.

We therefore find the Plan to be a neutral law of general applicability not subject to strict scrutiny.

3. Does the Redevelopment Plan Survive Rational Basis Review?

As a neutral, generally applicable law, the Plan is not subject to strict scrutiny. Even if Lighthouse had shown that the Plan incidentally burdened its right to free exercise of religion, it would only have to satisfy rational basis review in order to be deemed constitutional.

"[I]f [a] zoning law only incidentally burdens the free exercise of religion, with the law being both neutral and generally applicable, it passes

constitutional muster unless the law is not rationally related to a legitimate government interest." *San Jose Christian College,* 360 F.3d at 1031. Under rational basis review, "[a] statute is presumed constitutional, and the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not that basis has a foundation in the record." *Heller v. Doe,* 509 U.S. 312, 321, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993) (internal citations and quotation marks omitted). The regulation must be reasonable and not arbitrary and it must bear "a rational relationship to a [permissible] state objective." *Belle Terre v. Boraas,* 416 U.S. 1, 8, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974). The same analysis applies here to the Plan; the Plan is valid under rational basis review.

IV. Conclusion

For the reasons stated above, we will affirm in part and vacate in part the judgment of the District Court. We will affirm the District Court's entry of summary judgment for the City of Long Branch as to Lighthouse's Free Exercise Clause challenges both to the Ordinance and to the Plan and as to its challenge to the Plan under RLUIPA's Equal Terms provision. However, we will vacate the District Court's entry of summary judgment for Long Branch on Lighthouse's facial challenge to the Ordinance under RLUIPA's Equal Terms Provision and remand for further proceedings consistent with this opinion.

JORDAN, *Circuit Judge, Concurring in part and Dissenting in part*

This case presents two related questions: first, whether zoning ordinances of the City of Long Branch, New Jersey ("Long Branch" or the "City") that prohibit churches while permitting the establishment of places for secular assemblies such as theaters, cinemas, and lecture halls constitute a violation of the Religious Land Use and Institutionalized Persons Act ("RLUIPA" or the "Act"), 42 U.S.C. §§ 2000cc *et seq.;* and second, whether those same ordinances constitute a violation of the First Amendment's guarantee of the Free Exercise of Religion. In less legalistic language, we are asked whether religion can be made to take a back seat to a City's economic development goals. My colleagues in the Majority say it can. On this record and on the basis of the Act, I must disagree and therefore respectfully dissent from that portion of the Majority's judgment affirming summary judgment for the City. I do agree, however, with the Majority's conclusion that the earlier of the ordinances at issue violated RLUIPA and therefore concur with the judgment to that extent. Because I believe the case can be decided strictly on statutory grounds, I do not reach the constitutional issues except to the extent that they are embodied in the Act.

I. Factual and Procedural Background[18]

The Lighthouse Institute for Evangelism, Inc. is a New Jersey nonprofit corporation formed in 1991 and led by Reverend Kevin Brown, an ordained Baptist minister.[19] Lighthouse's mission is to minister to its congregation in keeping with Christian doctrine, to operate a school for those interested in joining the ministry, and to provide a variety of benevolent services to the community in which it has operated and seeks to operate. On March 1, 1992, Lighthouse began its work in rented space on 159 Broadway in Long Branch by holding Bible study classes and public prayer meetings. In the years since, it has also provided daily meals for the poor, as well as job placement and substance abuse counseling. Lighthouse deliberately chose to establish itself in a community "where nearly one quarter of the households ... earn[ed] under $15,000 a year" so that it could provide services where it perceived the needs were most acute. (Plaintiffs-Appellants' Appendix ["PA"] 27.)

On November 8, 1994, Lighthouse purchased an

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[18] While I generally agree with the background information set forth in the majority opinion, I provide the following as further context for my perspective on the case. Because we are reviewing an appeal of a grant for summary judgment, I present the facts in the light most favorable to the plaintiffs, against whom the order was entered. *Lindsey v. Caterpillar, Inc.*, 480 F.3d 202, 205 (3d Cir.2007).

[19] As did the Majority, I will, for brevity, hereafter refer to Lighthouse and Reverend Brown collectively as "Lighthouse" unless otherwise noted.

abandoned building across the street from its rented location, at 162 Broadway, and planned to continue its mission there. When it purchased the property, it believed it had the support of the City. The City's mayor had voiced his support on many occasions, had written a congratulatory letter to Reverend Brown after the purchase, and had awarded Lighthouse a mini-grant "for the expansion of [its] soup kitchen and related facilities to new quarters."[20] (PA 63 (emphasis removed).)

The 162 Broadway property is located in a part of the City once known as the C-1 Central Commercial District, as designated by Long Branch Ordinance 20-6.13 (the "C-1 Ordinance"). The C-1 Ordinance did not list churches as one of the "permitted uses" within the C-1 district, but it did list, among other things, restaurants, post-secondary educational institutions, assembly halls, bowling alleys, motion picture theaters, municipal buildings, health spas, gyms, barber shops, and beauty salons. (PA 81-83.) Lighthouse claims that, soon after it acquired the property on 162 Broadway, the City restrained it from performing its mission, despite having allowed it to do so for years when it rented space across the street. On August 1, 1995, Lighthouse submitted an application for a variance to the City Planning Board to operate a soup kitchen and counseling center and to provide missionary outreach, job skills training, Bible classes, and life

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[20] According to Lighthouse, it never received those funds because the newly constituted city council that took office in July of 1994 voted to retract the mini-grant.

skills classes.[21] The City deemed the application incomplete, saying it was not completely filled out, the fees were not paid, and the plans and survey submitted with it were not sealed.

This was an early round in what Lighthouse claims was a concerted effort by the City to thwart Lighthouse's attempt to obtain a variance, an effort Lighthouse says was characterized by the City's stalling Lighthouse's application with technical requests, failing to put it on the City's agenda when Lighthouse met the technical requests, and failing to consider Lighthouse's request for a waiver of fees on account of its nonprofit status.[22] Indeed, according to

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[21] According to the Majority, Lighthouse first sought approval to use its property as a church in April of 2000. Maj. Op. at 257. While not wanting to argue semantics, the purposes for which Lighthouse sought to use its property in its 1995 application include uses that one could fairly say indicate that Lighthouse was seeking land use approval as a "church." Since the City in 1997 denied use of the property for, among other things, "church services" (PA 509), it is clear that the City understood Lighthouse was trying to operate as a church before April of 2000.

[22] Lighthouse describes its views of the bureaucratic run around as follows:

> Right from the outset to the very present, the Mission's Application became ensnared in "the Loop", with the Loop being defined as the Long Branch's bureaucracy's concerted endeavor designed to frustrate, discourage, and ultimately thwart the Mission's efforts to gain use, by among other things:
>
> a. continually restraining the Mission from performing its ministerial functions at 162 Broadway;
>
> b. exhibiting deliberate indifference to the Mission's Application by allowing it to languish;

Lighthouse, the City's Director of Community Development was plain enough to state that the City "was never going to allow [Lighthouse] to use 162 Broadway." (PA 31.) Lighthouse asserts that Reverend Brown met with officials from an organization called Pendar Development ("Pendar") to find an alternative location to pursue its mission. Pendar agreed to approach the City to discuss the possibility of allowing Lighthouse to relocate to a former nursing home. According to Lighthouse, the City told Pendar and Reverend Brown after several meetings that it would work with Pendar to develop the property on the condition that Pendar "dropped its affiliation with Rev. Brown." (PA 31.)

On March 26, 1997, Lighthouse applied for a zoning permit to use the property as offices for Lighthouse personnel. The City granted the zoning permit, but specified that the property could not be used for "church services/soup kitchen/classes." (PA

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c. stalling the Mission's Application with hyper technical requests, and then when these requests were fulfilled, still failing to place the Application on the 'agenda';

d. failing to consider the Mission's request for a waiver of fees on account of the Mission's non-profit status (a common practice when the applicant is a charitable organization);

e. not granting use, thus preventing the Mission from obtaining its constitutionally guaranteed tax exemption; and

f. attempting to harass and intimidate the Mission and Rev. Brown through the constant issuance of various summonses for alleged code violations, as well as other forms of continual harassment.

(PA 30 at ¶ 25.)

509.) On April 26, 2000, Lighthouse applied for a zoning permit to use the building as a church. The zoning officer denied the application the next day because the proposed use was not permitted in the C-1 zone without a variance.

On June 8, 2000, Lighthouse and Reverend Brown filed a complaint against the City in the Superior Court of New Jersey. The City subsequently removed the action to the United States District Court for the District of New Jersey. On October 23, 2000, Lighthouse filed an amended complaint alleging, among other things, violations of the Free Exercise Clause and the then-newly enacted RLUIPA.[23] On March 13, 2001, Lighthouse filed a motion seeking a preliminary injunction to compel the City to grant Lighthouse's zoning permit application. The District Court denied Lighthouse's motion.

Lighthouse appealed the District Court's denial of its motion for a preliminary injunction and this Court, in a nonprecedential opinion, affirmed. *The Lighthouse Inst. for Evangelism Inc. v. The City of Long Branch,* 100 Fed.Appx. 70, 73 (3d Cir.2004). Regarding Lighthouse's RLUIPA claim, we stated that, because Lighthouse "did not show that it would be prohibited from operating in the district if it applied under the 'assembly hall' category, it could not show that the [C-1] Ordinance, on its face, treated it on less than equal terms than a

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[23] RLUIPA was signed into law on September 22, 2000. Pub.L. No. 106-274, 114 Stat. 803-806.

nonreligious assembly." *Id.* at 77.[24] We also stated that Lighthouse had failed to produce any evidence that the nonreligious assemblies it identified were similarly situated "such that a meaningful comparison could be made" under the provision of RLUIPA that forbids treating religious and nonreligious assemblies on less than equal terms. *Id.* As support for that statement, we cited a case decided under the Equal Protection Clause of the Fourteenth Amendment. *Id.* (citing *Congregation Kol Ami v. Abington Twp.*, 309 F.3d 120 (3d Cir.2002)).

In the meantime, while Lighthouse's motion for a preliminary injunction was pending in the District Court, the City changed the applicable zoning ordinances. On October 8, 2002, the City passed redevelopment ordinance 47-02 (the "Redevelopment Plan" or, as the Majority refers to it, the "Plan") pursuant to N.J.S.A. § 40A:12A. The Redevelopment Plan superseded the "applicable provisions of the development regulations of the municipality or constitute[d] an overlay zoning district within the redevelopment area." N.J.S.A. § 40A:12A-7(c). The City's stated purpose in adopting the Redevelopment Plan was to "achieve redevelopment of an underdeveloped and underutilized segment of the City" by, among other things, strengthening retail trade and city revenues, increasing employment opportunities, improving the city's image, and attracting more retail and service enterprises. (PA 87-88.) To achieve those goals, the

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[24] The City has since admitted in an interrogatory that, under the C-1 Ordinance, the term "assembly hall" did not include Houses of Worship.

City planned to "establish a center for the arts that [would] attract artists from the whole region" and "restore lower Broadway[, i.e., the 'Zone'], traditionally the downtown of Long Branch, as the principal commercial district of the city." (PA 95, 97.) The City wanted to accommodate "rich and varied uses" in the Zone, to stimulate retail in all areas, and to have a "diversity of attractions" to "bring people together from all parts of Long Branch and neighboring communities." (PA 97.) The Redevelopment Plan listed the kinds of entities the City wanted in the Zone, such as theaters, cinemas, dance studios, culinary schools, music instruction centers, theater workshops, fashion design schools, art studios, restaurants, bars and clubs, book stores, and craft stores. (*Id.*) Churches did not make the cut. Evidently, "rich and varied uses" were not seen to include religious devotions. Since churches were not on the list of desirable downtown entities, the Redevelopment Plan prohibited them.

The Plan created new application requirements for development within the affected areas. Under those new requirements, no property could be developed in the Zone until a Request for Qualification ("RFQ") and a Request for Proposal ("RFP") had been approved by the City Council.[25] While no formal procedure for individualized zoning waivers was included in the Plan itself, there is evidence to suggest that the City Council did, as in

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[25] As noted by the Majority, an RFQ requires applicants to describe the development team members' qualifications, experience, and financial capacity. An RFP requires a detailed description of the project to be undertaken.

this instance, at least consider waivers with respect to the Plan, (*see* PA 231 ("Now, therefore, be it resolved, by the City Council of the City of Long Branch that the application for a waiver of the Redevelopment Plan to allow houses of worship in the entertainment/commercial section of the Redevelopment Zone 6 in lower Broadway is denied.")), and, of course, the City Council had the power to amend the Plan.

On November 11, 2003, Lighthouse submitted an RFQ and application to develop its property as a church. On December 23, 2003, the Redevelopment Council of the City of Long Branch notified Lighthouse that its application had been rejected because the "proposed church use did not comport with the Redevelopment Plan and would in fact disrupt the zone." (PA 226.) Lighthouse appealed that decision to the Mayor and City Council and, at the same time, sought to have the Redevelopment Plan amended to allow houses of worship in the Zone or, alternatively, to obtain a waiver of the prohibition of church use.

After administrative hearings, the City Council voted unanimously to deny the waiver and application because churches were not permitted in the Zone and because the RFQ was "sketchy" with respect to project funding, scope, aesthetics and design, and plans for parking. (PA 226, 232.) The City Council determined that granting a waiver would have a "detrimental effect on the zoning planned for the area which was to be an entertainment/commercial zone with businesses that are for profit." (PA 227.) As emphasized by my

colleagues in the Majority, one problem the City perceived is that a state statute and a municipal ordinance prohibit the City from issuing liquor licenses to businesses within the vicinity of a church. Consequently, according to the City, allowing Lighthouse in the Zone "would destroy the ability of the block to be used as a high end entertainment recreation area." (PA 229.) The City reached that conclusion despite a provision in the state statute allowing a church to waive its rights under the statute,[26] despite Lighthouse's express agreement to waive those rights in perpetuity if allowed to establish a church within the Zone, and despite the City's apparent failure to enforce its own ordinance in any meaningful way.[27]

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[26] N.J.S.A. § 33:1-76 provides that the "protection of this section may be waived at the issuance of the license and at each renewal thereafter, by the duly authorized governing body on authority of such church ..., such waiver to be effective until the date of the next renewal of the license." And, if the "license has been ... renewed on authority of annual waivers by the church ... for 15 or more consecutive years, the holder of such license shall thereafter be entitled to apply for renewal or reissuance thereof without ... [a] waiver ... of the church...."N.J.S.A. § 33:1-76.2.

[27] According to the City's brief, the City has its own alcoholic beverage ordinance that prohibits the sale of alcoholic beverages within one thousand feet of a religious organization and prohibits the issuance of a license within one thousand feet of another establishment with a license. (Appellee's Brief at 32, 41.) However, the parties have not submitted a copy of the ordinance for the record, or even a citation to it, and Lighthouse disputes its existence. The City's assistant planning director and acting zoning officer testified that it was possible there were churches in the City within a thousand feet of an entity with a liquor license. In fact, the City has conceded in its brief that it issued waivers with respect to the part of the alcoholic

On July 26, 2004, Lighthouse amended its complaint to add statutory and constitutional challenges to the Redevelopment Plan. On December 27, 2005, the District Court granted summary judgment for the City on all of Lighthouse's claims. *The Lighthouse Inst. for Evangelism, Inc. v. The City of Long Branch,* 406 F.Supp.2d 507, 524 (D.N.J.2005). On appeal now are the District Court's conclusions regarding the alleged violations of section 2(b)(1) of RLUIPA, 42 U.S.C. § 2000cc(b)(1) ("section 2(b)(1)") and the Free Exercise Clause.

II. Analysis

In my view, both the C-1 Ordinance and the Redevelopment Plan are unlawful. Since my colleagues in the Majority and I are in agreement that the C-1 Ordinance violated RLUIPA, my analysis is focused primarily on the Redevelopment Plan and its shortcomings under RLUIPA. I do not reach the question of whether the C-1 Ordinance and the Redevelopment Plan also violate the Free Exercise Clause because Lighthouse ought to obtain full relief under the statute. *See Spector Motor Serv., Inc. v. McLaughlin,* 323 U.S. 101, 105, 65 S.Ct. 152, 89 L.Ed. 101 (1944) ("If there is one doctrine more deeply rooted than any other in the process of

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beverage ordinance that prohibits the issuance of a license within one thousand feet of another establishment with a license. In addition, the City admitted at oral argument that it was "relaxing" its enforcement of its alcohol laws in the Zone to promote the goals of the Redevelopment Plan. I agree with the Majority, Maj. Op. at 259 n. 7, that, under these circumstances, the City's alcoholic beverage ordinance warrants no consideration.

constitutional adjudication, it is that we ought not to pass on questions of constitutionality ... unless such adjudication is unavoidable.").

Section 2(b)(1) of RLUIPA provides that "[n]o government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." 42 U.S.C. § 2000cc(b)(1). It is uncontested that the City is a "government" within the meaning of the statute, that the C-1 Ordinance and the Redevelopment Plan are "land use regulations" within the meaning of the statute, and that churches are "religious assembl[ies] or institution[s]" that are treated differently than nonreligious assemblies or institutions under the City's land use regulations. *See* Maj. Op. at 262. Nevertheless, the District Court granted summary judgment in favor of the City with respect to Lighthouse's section 2(b)(1) claim. As accurately described by the Majority, the District Court concluded that Lighthouse had failed to demonstrate that the City imposed a substantial burden on the free exercise of religion and that Lighthouse had failed to show it was similarly situated to nonreligious assemblies receiving more favorable treatment from the City. The City now argues that, in addition to the grounds the District Court relied upon, summary judgment was appropriate on Lighthouse's section 2(b)(1) claim because the land use ordinances are neutral and generally applicable. The City also argues that, even if it did treat Lighthouse on less than equal terms than nonreligious assemblies, it had a compelling government interest for doing so and that the means

it used were narrowly tailored to meet that interest.

The City's arguments are not well founded, and neither is the District Court reasoning that the City attempts to defend here. With all respect to the District Court and its work on this challenging case, and likewise with due regard for my colleagues who have wrestled with the case on this and the previous appeal, I believe the District Court undertook an analysis that is neither warranted by the text of the statute nor compelled by any concern regarding the statute's constitutionality, and I further believe that some measure of the responsibility for that error lies in our earlier opinion, to the extent it encouraged the District Court to read into RLUIPA a "similarly situated" analysis imported from equal protection jurisprudence.

Nevertheless, I do not find myself totally at odds with the Majority's opinion on this latest round in the dispute. I agree with the Majority that the District Court should not have grafted onto section 2(b)(1) a "substantial burden" requirement. I also agree that the District Court erred by holding that, for Lighthouse to prevail on its 2(b)(1) claim, Lighthouse had to show that it was treated on less than equal terms than a secular counterpart so similarly situated that both entities, the religious and the secular, involved exactly the same combination of land uses. I acknowledge, as does the Majority, the need for some kind of comparator. That is, of course, inherent in the concept of "less than equal terms," which implies a comparison. But, unlike the Majority, I do not believe the statute requires any greater similarity than is inherent in

the broad terminology "assembly or institution," i.e., the terminology of the statute itself. The correct analysis should begin and, to the extent possible, end with the language of the statute. Since the text of both the C-1 Ordinance and the Redevelopment Plan treats churches differently than nonreligious assemblies or institutions, I would reverse the District Court's grant of summary judgment for the City and direct that judgment be entered in favor of Lighthouse on its RLUIPA claim.[28]

A. Section 2(b)(1) of RLUIPA Does Not Require Plaintiffs to Demonstrate a Substantial Burden on Religious Exercise

As previously noted, I agree with the Majority that, for reasons they cite and I will not repeat, section 2(b)(1) does not require Lighthouse to demonstrate a substantial burden on religious exercise. When interpreting a statute, the starting point is to determine if the language is plain and unambiguous, "for '[i]f the intent of Congress is clear, that is the end of the matter.' " *Good Samaritan Hosp. v. Shalala,* 508 U.S. 402, 409, 113 S.Ct. 2151, 124 L.Ed.2d 368 (1993) (quoting *Chevron U.S.A. Inc. v. Natural Res. Defense Council, Inc.,* 467 U.S. 837, 842, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)). Section 2(b)(1) very simply prohibits zoning regulations that treat religious assemblies or institutions "on less

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[28] The District Court denied Lighthouse's cross-motion for summary judgment on its claims under RLUIPA at the same time it granted the City's motion for summary judgment. *Lighthouse,* 406 F.Supp.2d at 524.

than equal terms" than secular assemblies or institutions. 42 U.S.C. § 2000cc(b)(1). It is a spare and straightforward statute. Congress included no language in section 2(b)(1) indicating that a plaintiff must demonstrate a substantial burden on religious exercise to obtain relief, and I can discern no constitutionally compelled basis for reading that requirement into that subsection of the statute.

B. Section 2(b)(1) of RLUIPA Addresses the Neutrality and General Applicability of a Challenged Ordinance Within the Framework of a "Less than Equal Terms" Analysis

In my view, the appropriate analysis to undertake in deciding whether the City's imposition or implementation of the challenged ordinances violates section 2(b)(1) of RLUIPA requires three steps. First, we should determine whether each of the challenged ordinances is a land use regulation. Second, though it is in this instance self-evident and not seriously disputed, we should decide whether Lighthouse is a religious assembly or institution. Third, we should decide whether the City's enactment or implementation of the challenged ordinances results in Lighthouse being treated on less than equal terms with a nonreligious assembly or institution.

No one contests that the C-1 Ordinance and the Redevelopment Plan are land use regulations. Nor is there any legitimate contention that Lighthouse is not a religious assembly or

institution.[29] The parties further agree that several of the permitted uses under both the Ordinance and the Plan constitute nonreligious assemblies. Thus, the dispute in this case is whether the City's instituting or implementing of the challenged ordinances has resulted in Lighthouse being treated "on less than equal terms" with one of the permitted nonreligious assemblies.

The Eleventh Circuit has identified three distinct ways in which a government's enactment or implementation of a land use regulation might result

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[29] As the Eleventh Circuit has recognized, Congress did not define the terms "assembly" or "institution" in the statute. *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1230 .(11th Cir.2004). Accordingly, we should construe the statutory terms "in accordance with [their] ordinary or natural meaning[s]." *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 476, 114 S.Ct. 996, 127 L.Ed.2d 308 (1994). An "assembly" is defined as "a company of persons gathered together for deliberation and legislation, worship, or entertainment,"*Merriam-Webster's Collegiate Dictionary* 69 (10th ed.2002), or as "[a] group of persons organized and united for some common purpose." *Black's Law Dictionary* 111 (7th ed.1999). An "institution" is "an established organization or corporation ... esp. of a public character." *Merriam-Webster's Collegiate Dictionary* 605 (7th ed.1999); *see also Black's Law Dictionary* 801 (7th ed.1999) (defining "institution" as "[a]n established organization, esp. one of a public character"); *see also Midrash*, 366 F.3d at 1230-31 (defining both "assembly" and "institution" in a manner consistent with the foregoing dictionary definitions).

The City asserts that Lighthouse has not "produced evidence to show that it is an assembly," (Appellee's Brief at 30); however, the City cannot seriously contend that Lighthouse is not a religious assembly when one of the reasons it denied Lighthouse's RFQ application was because the "proposed church use did not comport with the redevelopment plan...." (PA 226.)

in a religious assembly being treated "on less than equal terms":

> (1) a statute that facially differentiates between religious and nonreligious assemblies or institutions; (2) a facially neutral statute that is nevertheless 'gerrymandered' to place a burden solely on religious, as opposed to nonreligious, assemblies or institutions; or (3) a truly neutral statute that is selectively enforced against religious, as opposed to nonreligious assemblies or institutions.

Primera Iglesia Bautista Hispana v. Broward Cty., 450 F.3d 1295, 1308 (11th Cir.2006).

In *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214 (11th Cir.2004), the Eleventh Circuit confronted the first situation: a statute that, on its face, differentiated between religious assemblies and nonreligious assemblies. There, the town of Surfside had a zoning ordinance that permitted theaters, restaurants, private clubs, lodge halls, health clubs, dance studios, music instruction studios, modeling schools, language schools, and schools of athletic instruction in the town's business district, but that did not permit churches or synagogues. *Id.* at 1220.[30]

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[30] Similar to this case, the town alleged that it designed its zoning ordinances "in part to invigorate [its] business district and to create a strong tax base" through retail establishments. *Id.* at 1221. The business district, the town claimed, was vital to its tax base, job base, and its ability to serve the needs of the residents. It asserted that allowing religious institutions in that district would contribute little synergy to retail shopping areas, disrupt the continuity of retail

Because churches, synagogues, private clubs, and lodges all fell under the definition of "assemblies" or "institutions," and because Surfside permitted private clubs and other secular assemblies in the business district but categorically excluded synagogues and other religious assemblies, the court held that the town's zoning ordinance, on its face, violated section 2(b)(1). *Id.* at 1231. Indeed, the court noted that the legislative history indicated that section 2(b)(1) "was intended to apply in *precisely* the situation [it was addressing]." *Id.* at 1231 n. 14; *see also*146 Cong. Rec. S7774 (2000) (joint statement of Sen. Hatch and Sen. Kennedy) ("Zoning codes frequently exclude churches in places where they permit theaters, meeting halls, and other places where large groups of people assemble for secular purposes.").

The facts of this case bear a striking resemblance to those in *Midrash*. Here, the texts of the challenged ordinances permit schools, assembly halls, gyms, theaters, cinemas, restaurants, and bars and clubs, all of which qualify broadly as assemblies or institutions because people gather in those places to be entertained or educated or to otherwise organize themselves for some common purpose.[31]

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environments, erode its tax base, jeopardize its economic stability, and eventually result in economic hardship on the residents. *Id.*

[31] Not all of these entities were permitted under both ordinances, although there is substantial overlap. The C-1 Ordinance allowed establishments such as restaurants, educational institutions, assembly halls, bowling alleys, motion picture theaters, municipal buildings, health spas, and gyms.

Religious assemblies, such as churches and synagogues, are not permitted under either ordinance.[32] Like the Eleventh Circuit in *Midrash,* I conclude that such differential treatment on the face of both the C-1 Ordinance and the Redevelopment Plan constitutes a violation of section 2(b)(1). Put simply, churches are treated "on less than equal terms" than the permitted nonreligious assemblies because churches are categorically prohibited.[33] The

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(PA 81-83.) The Redevelopment Plan permits establishments such as theaters, cinemas, dance studios, culinary schools, music instruction, theater workshops, fashion design schools, art studios, restaurants, and bars and clubs. (PA 97.)

[32] Neither ordinance explicitly states, "Churches are forbidden"; however, churches are plainly prohibited by both ordinances because churches are not listed by either as a permitted use. Indeed, the City denied Lighthouse's April 2000 application to use the Property as a church because churches were not permitted in the C-1 zone, and the City denied Lighthouse's December 2003 application because "church use did not comport with the Redevelopment Plan."(PA 226.) Both the text of each ordinance and the City's expressions of its own understanding of that text make it clear that churches, as a category, are not permitted.

[33] Because the challenged ordinances, on their faces, differentiate between religious and nonreligious assemblies or institutions, there is no need to examine whether the ordinances are unlawful in either of the other manners identified by the Eleventh Circuit. *See Primera Iglesia,* 450 F.3d at 1311. It is noteworthy, however, that Lighthouse has presented evidence that the city's zoning ordinances were selectively enforced. In other words, Lighthouse has proffered evidence that the challenged ordinances were implemented in a manner that treated Lighthouse on less than equal terms with other, secular assemblies. I am not suggesting that, in fact, the City's leaders bore a grudge against Lighthouse and Reverend Brown. That may ultimately be a question for a finder of fact. I

City here may have a laudatory redevelopment aim, but, as in *Midrash,* that does not save the City's actions from being unlawful.[34]

The Majority and the District Court each reject the Eleventh Circuit's approach in *Midrash* because they apparently fear it interprets RLUIPA so broadly as to make rational zoning impossible whenever a church is in the mix. Contrary to those concerns, however, the Eleventh Circuit's interpretation of section 2(b)(1) does not prohibit governments from applying zoning restrictions to churches. For one thing, an ordinance prohibiting churches in a zone would not likely violate section

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simply note that there is evidence to support Lighthouse's assertion that the City deliberately put the Reverend and his church on the bureaucratic equivalent of an Escher staircase, creating and enforcing an endlessly recursive zoning procedure to prevent Lighthouse from ever opening its doors at 162 Broadway. I believe there is a basis in the record to conclude that the City simply didn't want this religious group downtown, ever, and therefore there is an additional reason that summary judgment was improper.

[34] The Majority concludes that violations of section 2(b)(1) of RLUIPA do not receive strict scrutiny; instead, it holds that RLUIPA imposes a strict liability standard. I do not think it necessary to decide in this case whether section 2(b)(1) imposes strict liability under all circumstances because, at least with respect to a zoning ordinance that, on its face, treats religious assemblies on less than equal terms, strict scrutiny, no less than strict liability, will result in liability. *Cf. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 546, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) ("A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases.").

2(b)(1) if nonreligious assemblies and institutions were also prohibited. *See Konikov v. Orange County*, 410 F.3d 1317, 1325-26 (11th Cir.2005) (holding that a zoning ordinance permitting "model homes" and "home occupations" in a residential zone but prohibiting synagogues and church services did not, on its face, violate section 2(b)(1) because "model homes" and "home occupations" did not qualify as "assemblies or institutions").

Again, contrary to the Majority's claim, the Eleventh Circuit's interpretation of section 2(b)(1) does not "give any and all religious entities a free pass to locate wherever any secular institution or assembly is allowed." Maj. Op. at 268. The Majority hypothesizes that,

> under the Eleventh Circuit's interpretation, if a town allows a local, ten-member book club to meet in the senior center, it must also permit a large church with a thousand members-or, to take examples from the Free Exercise caselaw, it must permit a religious assembly with rituals involving sacrificial killings of animals or the participation of wild bears-to locate in the same neighborhood regardless of the impact such a religious entity might have on the envisioned character of the area.

Id. This parade of horribles has the benefit of some "lions and tigers and bears, oh my!" shock value, but I do not read RLUIPA as somehow preventing a city from including in its zoning ordinances rational terms restricting the use of land, as long as those terms apply equally to religious assemblies and

nonreligious assemblies. *See Digrugilliers v. Consolidated City of Indianapolis,* 506 F.3d 612, 615, 2007 WL 3151201, at *2 (7th Cir. Oct.30, 2007) ("Whatever restrictions the City imposes on other users of land in [its C-1 commercial district] it can impose on the Baptist Church of the West Side without violating the 'equal terms' provision.").

For example, a large church might lawfully be prohibited from locating in a neighborhood by an ordinance regulating the physical size of buildings. *See, e.g., Vision Church, United Methodist v. Village of Long Grove,* 397 F.Supp.2d 917, 930 (N.D.Ill.2005) (holding that a zoning ordinance restricting building size did not violate section 2(b)(1) because the ordinance applied equally to religious and nonreligious institutions), *aff'd on other grounds,* 468 F.3d 975 (7th Cir.2006). Moreover, while I have not found any cases explicitly addressing the point, no one that I am aware of has suggested that section 2(b)(1) prevents a city from prohibiting either animal slaughter or the possession of wild bears in a zone. If a city wanted to, it could properly enact a zoning ordinance prohibiting either, as long as the ordinance applied equally to religious assemblies and nonreligious assemblies.[35]

In this case, however, the applicable ordinances do not treat religious assemblies and nonreligious assemblies on equal terms. Instead,

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[35] Of course, to comply with the requirements of the Free Exercise Clause, such a law must also either be neutral and generally applicable or withstand strict scrutiny. *See Lukumi,* 508 U.S. at 531-32, 113 S.Ct. 2217.

religious assemblies are categorically prohibited. Holding that these ordinances violate section 2(b)(1) does not give religious entities "a free pass." It does nothing more than reach exactly the result Congress intended. *See*146 Cong. Rec. at S7774 ("Churches in general, and new, small, or unfamiliar churches in particular, are frequently discriminated against on the face of zoning codes.... Zoning codes frequently exclude churches in places where they permit theaters, meeting halls, and other places where large groups of people assemble for secular purposes.").

Nevertheless, the City argues, and the Majority accepts, that the City did not treat Lighthouse on less than equal terms with nonreligious assemblies and institutions because the zoning ordinances at issue are "neutral and generally applicable." I fundamentally disagree with that characterization of the ordinances, and believe that the City and the Majority have approached the question from the wrong direction.

The "neutral and generally applicable" language is lifted from Free Exercise Clause jurisprudence. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 531, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) ("[A] law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice."). While it is true that the legislative history of RLUIPA shows that Congress intended to codify aspects of that jurisprudence, *see*146 Cong. Rec. at S7776 ("Sections 2(b)(1) and (2) ... enforce the Free Exercise Clause

rule against laws that burden religion and are not neutral and generally applicable"), that does not mean Congress meant to simply replicate the analysis that would be undertaken in addressing a Free Exercise claim. Viewing a RLUIPA claim as the precise equivalent of a Free Exercise claim renders the statute superfluous. Congress chose to define a violation under section 2(b)(1) not in terms of an ordinance's lack of neutrality and general applicability but rather in terms of equality of treatment, i.e., whether the ordinance treats a religious assembly or institution "on less than equal terms" with a nonreligious assembly or institution. 42 U.S.C. § 2000cc(b)(1). Again, we should be starting with the text. If we were taking the language Congress chose as the starting point of our analysis, we would not only be faithful to legislative intent, we would avoid the confusion that attends a multiplication of legal tests.

Moreover, to say an ordinance is neutral and generally applicable should be no defense to a charge of unequal treatment. First, it presents a logical contradiction. As the Eleventh Circuit observed in *Midrash,* if a zoning law on its face treats religious and nonreligious assemblies or institutions on less than equal terms, that law is not genuinely neutral or generally applicable, "because such unequal treatment indicates the ordinance improperly targets the religious character of an assembly." 366 F.3d at 1232. Second, it is, in an important sense, beside the point. If the treatment is unequal and the other prerequisites set by the statute have been met, then a claim has been established. Even if one were to find an instance of unequal treatment imposed in

accordance with a neutral and generally applicable statute-and, again, I think that akin to an oxymoron-what you would then be dealing with would not be a defense to the charge that a RLUIPA violation had occurred but rather would be an attack on RLUIPA itself, on the grounds that it is unconstitutionally broad, as was the Religious Freedom Restoration Act. *Cf. City of Boerne,* 521 U.S. at 536, 117 S.Ct. 2157 ("Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance."). Since the City never purported to raise a constitutional challenge to the statute, those ramifications of their "neutral and generally applicable" defense were never explored.[36]

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[36] The Majority takes me to task for advocating an interpretation of section 2(b)(1) that it doubts is constitutional. *See* Maj. Op. at 269 n. 14. It is noteworthy, however, that no one in this case has challenged the constitutionality of section 2(b)(1), even though the straightforward reading of the statute I propose was expressly advocated by Lighthouse.

Nevertheless, I wish to note that I do not harbor the same degree of skepticism as the Majority regarding the constitutionality of section 2(b)(1) as written. The Supreme Court has recognized that Congress has broad power to enact legislation under section 5 of the Fourteenth Amendment to enforce the constitutional right to the free exercise of religion, a right that applies to state and local governments through the Due Process Clause. *City of Boerne v. Flores,* 521 U.S. 507, 519, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997) (citing *Cantwell v. Connecticut,* 310 U.S. 296, 303, 60 S.Ct. 900, 84 L.Ed. 1213 (1940)). That right to enforce does not allow Congress to alter the meaning of the Free Exercise Clause, but it does include the power to enact preventive and remedial legislation. *Id.* at 519, 524, 117 S.Ct. 2157. And Congress has "wide latitude" to

determine how far it can go in exercising that power. *Id.* at 519-20, 117 S.Ct. 2157.

In enacting RLUIPA, Congressional sponsors were endeavoring to avoid constitutional issues raised by the Supreme Court when it struck down portions of the Religious Freedom Restoration Act of 1993 ("RFRA"). *City of Boerne,* 521 U.S. at 519, 532-33, 117 S.Ct. 2157. Those sponsors were careful to point out that discrimination against religious entities in the land use context was "a nationwide problem." 146 Cong. Rec. S7774, S7775 (2000) (joint statement of Sen. Hatch and Sen. Kennedy). Congress compiled what it characterized as "massive evidence" that "[c]hurches in general, and new, small, or unfamiliar churches in particular, [were] frequently discriminated against on the face of zoning codes and also in the highly individualized and discretionary processes of land use regulation." *Id.* at S7774. The evidence proved to Congress that state and local governments had enacted zoning codes that frequently excluded "churches in places where they permit[ted] theaters, meeting halls, and other places where large groups of people assemble for secular purposes." *Id.* The evidence also demonstrated that government entities frequently allowed churches in those places "only with individualized permission from the zoning board, and zoning boards use[d] that authority in discriminatory ways." *Id.* Congress found that, most often, discrimination against religious entities had lurked behind "vague and universally applicable reasons" such as a concern for aesthetics, or concerns that allowing a church was "not consistent with the city's land use plan," or was not appropriate in commercial zones because churches don't generate business. *Id.* at S7774-75. On the basis of that record, Congress enacted RLUIPA as prophylactic legislation to prevent discrimination against churches in the processes of land use regulation. *See id.* at S7775 (RLUIPA provides "proportionate and congruent responses to the problems documented in this factual record."); *cf. City of Boerne,* 521 U.S. at 530-31, 117 S.Ct. 2157 (emphasizing that "[r]emedial legislation under § 5 'should be adapted to the mischief and wrong which the [Fourteenth] [A]mendment was intended to provide against.' " (quoting *Civil Rights Cases,* 109 U.S. 3, 13, 3 S.Ct. 18, 27 L.Ed. 835 (1883))). Because Congress developed a record, expressly relied on that record, and endeavored to tailor RLUIPA to meet the

But, even accepting that the correct analytical approach under RLUIPA is to ask whether the challenged ordinance is "neutral and generally applicable," the Majority does not address the fundamental question in this case. My colleagues state that, "[a] regulation does not automatically cease being neutral and generally applicable ... simply because it allows certain secular behaviors but not certain religious behaviors." Maj. Op. at 265. That may be true in the abstract, but we are not talking about abstractions. We have here two reasonably well-defined sets of proposed uses. If an ordinance on its face permits, indeed encourages, secular assemblies for the purpose of education and entertainment, which is what the ordinances at issue do, I am hard put to say it is neutral and generally applicable when that same ordinance leaves out of the "permitted" category religious assemblies. Many people who attend church services are seeking edification and learning. On what principled basis can an art workshop or a cooking class be governmentally preferred to a theological or philosophical discussion in Sunday School? Many people who attend church services find personal enjoyment and entertainment in the sermons they hear. Why should Hollywood's latest cinematic offering or a production of a popular Broadway play

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constitutional guidance provided by the Supreme Court in *City of Boerne*, I disagree with my colleagues' assertion that interpreting RLUIPA according to its plain language is ill-advised. Moreover, if a constitutional attack on RLUIPA had been mounted and were before us, and we were to conclude that RLUIPA is unconstitutionally broad, the proper result would be to strike it down as unconstitutional, not to re-draft it. *See City of Boerne*, 521 U.S. at 536, 117 S.Ct. 2157.

be governmentally preferred to preaching? I submit that there is no proper basis for the distinctions made in either the C-1 Ordinance or the Redevelopment Plan.

The City nevertheless defends its unequal treatment of religious assemblies by pointing to the state law that prohibits issuing liquor licenses within a certain distance of religious institutions.[37] According to the City, if churches were allowed in its Redevelopment Zone, the liquor law would prevent it from turning the Zone into a high-end entertainment district. New Jersey law, however, cannot take the City off the hook for violating RLUIPA. RLUIPA is a federal law, and no state or local government can defend against a charge that it has violated federal law on the basis that its actions were required by state law. Were it otherwise, a state could nullify RLUIPA simply by passing a statute mandating that churches be treated on unequal terms.

Indeed, in *Digrugilliers v. Consolidated City of Indianapolis,* the United States Court of Appeals for the Seventh Circuit rejected an identical argument to the one the City makes here. 2007 WL 3151201, at *3-4. There, the city of Indianapolis had a zoning ordinance that permitted assemblies such as auditoriums, assembly halls, community centers, and civic clubs in its C-1 commercial district, but that did not permit churches. *Id.* at * 1. Indianapolis defended its discriminatory treatment of churches on

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[37] New Jersey state law prohibits the issuance of liquor licenses within two hundred feet of any church. N.J.S.A. § 33:1-76.2.

the basis of state laws that forbade the sale of liquor within two hundred feet of a church, or pornography within five hundred feet. According to the city, allowing churches in the C-1 district could therefore interfere with other uses in the district. The Seventh Circuit, however, persuasively rejected the argument that the state laws could be a defense to an "equal terms" violation:

> Government cannot, by granting churches special privileges (... the right of the church to be free from offensive land uses in its vicinity), furnish the premise for excluding churches from otherwise suitable districts....
>
> ...
>
> It is irrelevant that the [two hundred foot and five hundred foot] protective zones ... were commanded by the state, while the exclusion itself was commanded by the City. The City is part of the government of Indiana, and if it would violate the federal Act for the City to exclude churches from C-1 districts-and since the City does not argue that the state is required by the First Amendment to create protective zones around churches-the City may not exclude churches from those districts. For the federal Act treats state and local government interchangeably, 42 U.S.C § 2000cc-5(4)(A)(i), and Indianapolis's power to zone is conferred by state law.... [A] state cannot be permitted to discriminate against a religious land use by a two-step process in which the state's discriminating in favor of religion becomes a predicate for one of the state's subordinate governmental units to

> discriminate against a religious organization in violation of federal law.

Id. at *3-4.

Like the city of Indianapolis, the city of Long Branch's power to adopt the C-1 Ordinance and the Redevelopment Plan is conferred by state law. N.J.S.A. § 40:55D-62 (power to adopt a zoning ordinance); N.J.S.A. § 40A: 12A-4 (power to adopt a redevelopment plan). The state's liquor law is therefore no defense to a zoning exclusion challenged under section 2(b)(1) of RLUIPA, a federal law. Moreover, the City's argument in this case is deprived of whatever persuasive force a true conflict of laws might provide because the state's liquor law permits churches to waive their rights under the statute,[38] and Lighthouse has expressly agreed to waive those rights if allowed to establish a church within the Zone.

The City also defends its unequal treatment of religious assemblies on the basis of economics. There are two answers to that. First, the economic rationale lacks credibility because the Plan contains no prohibition on non-profit museums, non-profit theater companies, non-profit educational institutions, or other non-profit organizations. Why such organizations are less likely to "disrupt the

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[38] N.J.S.A. § 33.1-76 states that "[t]he protection of this section may be waived at the issuance of the license and at each renewal thereafter, by the duly authorized governing body on authority of such church...." The constitutionality of a statute of this sort is questionable. *See Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 120-27, 103 S.Ct. 505, 74 L.Ed.2d 297 (1982).

zone" than Reverend Brown's church is not apparent. Second, the motive for violating the Act is simply irrelevant. Whatever the reason that secular assemblies, even non-revenue generating ones, are permitted while religious assemblies are forbidden, we are faced with precisely the problem Congress sought to rectify with RLUIPA. An economic rationale is not a license to ignore the lawful will of Congress.

C. Section 2(b)(1) of RLUIPA Does Not Require Plaintiffs to Demonstrate That They Are "Similarly Situated"

Because it reasons that a literal interpretation of section 2(b)(1) would lead to results unintended by Congress, the Majority disregards the plain language of the statute and replaces it with a new legal test that requires a religious assembly to identify "a better-treated secular comparator that is similarly situated in regard to the *objectives* of the challenged regulation." Maj. Op. at 268. The Majority reaches this conclusion after examining a number of Free Exercise cases from both this Court and the Supreme Court. As explained above, however, just because Congress intended to codify certain aspects of Free Exercise jurisprudence does not mean that Congress intended to replicate the analysis that would be undertaken in addressing a Free Exercise claim.

Putting that aside, however, the Majority's analysis is misguided for another reason. The cases relied on by the Majority in formulating its new test are inapposite because none of them deal with circumstances in which the face of the challenged

law distinguishes between conduct engaged in for religious reasons and conduct engaged in for nonreligious reasons. Instead, in all of those cases one of two circumstances was present: (1) the challenged law, while neutral on its face, had the effect of targeting conduct engaged in for religious, as opposed to nonreligious, reasons, *e.g., Lukumi,* 508 U.S. at 533-35, 113 S.Ct. 2217; or (2) the challenged law, while neutral on its face, was selectively enforced against conduct engaged in for religious reasons, *e.g., Tenafly Eruv Ass'n v. Borough of Tenafly,* 309 F.3d 144, 167-68 (3d Cir.2002).

In the first type of case, it may be relevant to compare the proscribed religious conduct with similarly-situated nonreligious conduct in order to support a conclusion that a challenged law, while facially neutral, improperly targets conduct engaged in for religious reasons. For example, in *Lukumi,* the Supreme Court examined facially neutral ordinances that had the effect of prohibiting religiously-motivated animal slaughter by adherents of the Santeria religion while permitting animal slaughter for other reasons. *Lukumi,* 508 U.S. at 533-35, 113 S.Ct. 2217. Among the City's justifications for the ordinances were to prevent cruelty to animals and to preserve the public heath; however, the ordinances provided exceptions for secular conduct that implicated those same concerns in the same ways as the proscribed religious conduct. *Id.* at 543-45, 113 S.Ct. 2217. By comparing the prohibited religious conduct with permitted conduct that implicated the city's interests in the same ways, the Court was able to conclude that the ordinances pursued the city's interests only against conduct engaged in for

religious reasons. *Id.* at 545, 113 S.Ct. 2217.

Likewise, in the second type of case-a facially neutral law that is selectively enforced-it may be necessary to compare the proscribed religious conduct with similarly-situated nonreligious conduct in order to support a conclusion that the government is improperly targeting certain conduct only when it is engaged in for religious reasons. For example, in *Tenafly,* we examined a facially neutral ordinance barring citizens from affixing signs or items to utility poles. *Tenafly,* 309 F.3d at 151. The local government enforced the ordinance against an Orthodox Jewish group that attached lechis, religiously significant items, to the poles, but permitted others in the community to attach items such as ribbons and church directional signs. *Id.* at 167-68. The government's justification for the ordinance was to prevent clutter; however, the government failed to enforce the ordinance against other conduct that implicated its concern in the same way as the religious group's conduct. *Id.* at 167-68, 172. By comparing the prohibited religious conduct with permitted conduct that implicated the government's interest in the same way, we were able to conclude that the government enforced the ordinances only against conduct engaged in for religious reasons. *Id.* at 167-68.

As these examples show, examining how a law would apply, or is applied, to similarly-situated secular conduct may indeed be useful when dealing with Free Exercise challenges to facially-neutral laws because it helps courts to determine whether the law improperly targets religiously-motivated

conduct. But such an analysis is not necessary when the text of the challenged law itself distinguishes between religiously-motivated conduct and nonreligiously-motivated conduct. *See Lukumi,* 508 U.S. at 532, 113 S.Ct. 2217 ("At a minimum, the protections of the Free Exercise Clause pertain if the law at issue ... regulates or prohibits conduct because it is undertaken for religious reasons."). Thus, even if I were to accept the Majority's premise that a RLUIPA claim should be analyzed like a Free Exercise claim, I do not believe it follows that a religious assembly must identify "a better-treated secular comparator that is similarly situated in regard to the objectives of the challenged regulation" under circumstances in which the face of the regulation distinguishes between religious and nonreligious assemblies. Instead, I believe a violation of section 2(b)(1) is established if the text of a zoning ordinance categorically excludes religious assemblies from an area where secular assemblies are permitted.

That is also the view of both the United States Courts of Appeals for the Seventh and the Eleventh Circuits, which have held that courts should not graft a "similarly situated" requirement onto section 2(b)(1) under circumstances in which the face of the land use regulation differentiates between religious assemblies and nonreligious assemblies. Each has stated that, for purposes of a challenge under section 2(b)(1), "the standard for determining whether it is proper to compare a religious group to a nonreligious group is *not* whether one is 'similarly situated' to the other, as in our familiar equal protection jurisprudence." *Vision Church,* 468 F.3d at 1002-03

(emphasis added) (quoting *Konikov,* 410 F.3d at 1324).

There are three other reasons that convince me Congress did not intend for courts to employ a "similarly situated" analysis when analyzing a section 2(b)(1) claim such as the one at issue here. The first is, again, the plain language of the statute. It does not state that religious and nonreligious entities must be "similarly situated" for a religious entity to find relief. *See Midrash,* 366 F.3d at 1229 ("[W]hile § [2](b)(1) has the 'feel' of an equal protection law, it lacks the 'similarly situated' requirement usually found in equal protection analysis.").[39]

Second, and closely related, the plain purpose of the statute, evidenced by its text and legislative history, shows that Congress was seeking to enforce the Free Exercise Clause. *See* 146 Cong. Rec. at

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[39] According to the Eleventh Circuit, if the government implements a land use regulation that, on its face, treats a religious entity on less than equal terms with a nonreligious entity, and those entities fall within the "natural perimeter" of the definition of "assembly" or "institution," there is a violation of section 2(b)(1). *Midrash,* 366 F.3d at 1230-31. The "natural perimeter" test appears to me to be nothing more than a practical approach to interpreting words. It asks what the common-sense reach of language is. It is a recognition that words in statutes generally have enough of a commonly understood meaning that, when not unduly stretched, they can be construed and sensibly applied to resolve legal disputes. In short, it is a label that encourages what ought to happen in every case, not just in First Amendment jurisprudence, namely, application of the statutory text in a manner that gives the words their natural, generally accepted meaning.

S7776 ("Sections 2(b)(1) and (2) ... enforce the Free Exercise Clause rule against laws that burden religion...."). No one has cited, and I am not aware of, any Supreme Court case holding that parties must demonstrate that they are "similarly situated" to someone else to establish a violation of the Free Exercise Clause.

Third, incorporating into RLUIPA the type of "similarly situated" analysis embedded in equal protection cases would frustrate Congress's intention of enforcing the Free Exercise Clause, because it would make it very difficult for religious assemblies to qualify for relief under section 2(b)(1). Our court has held that, to demonstrate that a religious entity is similarly situated to other entities permitted under a questioned zoning ordinance, one must show that the religious entity's purposes are not "functionally different" from the purposes of permitted entities, and that its uses "seem compatible" with the uses allowed in the area. *Congregation Kol Ami,* 309 F.3d at 142. Consequently, because religious and nonreligious assemblies and institutions are generally established for different purposes, with different goals and objectives, creative municipal officials and their lawyers should not find it difficult when a zoning conflict arises to find functional differences between the religious and nonreligious entities. *Cf. id.* at 130 (employing "similarly situated" requirement and "rational basis" test in vacating district court's decision that a municipality could not "allow a train station, bus shelter, municipal administration building, police barrack, library, snack bar, pro shop, club house, country club or other similar use to

request a special exception under the [challenged] Ordinance, but not [a religious congregation]"). If a "similarly situated" requirement is read into the statute, local governments will have a ready tool for rendering RLUIPA section 2(b)(1) practically meaningless.[40]

That is, sadly, exactly what has happened in this case. The District Court held that, because Lighthouse's "combination of intended uses ha[d] no similarly situated counterpart," Lighthouse was not "similarly situated to any nonsecular permitted uses either currently in existence or as imagined by the Redevelopment Plan" and thus could not establish a violation under section 2(b)(1). *Lighthouse,* 406 F.Supp.2d at 518. With a somewhat different analysis, the Majority has come to the same conclusion. In light of the statutory text and the abundantly clear legislative history of RLUIPA, I find it difficult to believe that Congress intended to incorporate *sub silencio* an analytical requirement that, as has happened here, can so readily undo the explicit "less than equal terms" requirement of the statute.

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[40] Indeed, in *Digrugilliers,* the Seventh Circuit dealt with the city of Indianapolis's attempt to do just that. *Digrugilliers,* 506 F.3d 612, 613, 2007 WL 3151201, at *1-2. In that case, the city defined "religious use" in its zoning code to include residential accessory uses (such as a rectory for the church minister) and then attempted, unsuccessfully, to use its own broad definition of "religious use" to justify its exclusion of churches from zones where other assemblies were permitted. *Id.* at 2.

III. Conclusion

At a minimum, section 2(b)(1) means that a city's zoning ordinance cannot categorically exclude churches from an area where secular assemblies are permitted. In a case like this, there is simply no legitimate basis for grafting onto section 2(b)(1) a "substantial burden" requirement, a "similarly situated" requirement, or a "neutral and generally applicable" requirement. Congress used its powers under section 5 of the Fourteenth Amendment to enact a straightforward statute that courts can apply, if they will, and that state and local governments can follow, if they will. By grafting additional elements onto section 2(b)(1) that do not reflect congressional intention, we hinder Congress's objective of enforcing the Free Exercise Clause to the fullest extent constitutionally permissible. Therefore, while I concur in the judgment to the extent it reverses the District Court's decision regarding the C-1 Ordinance, I respectfully dissent from that portion of the judgment upholding summary judgment for the City.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-1319

THE LIGHTHOUSE INSTITUTE FOR
EVANGELISM, INC.,
doing business as THE LIGHTHOUSE MISSION;
REVEREND KEVIN BROWN,

Appellants

v.

CITY OF LONG BRANCH; BCIC FUNDING CORP;
BREEN CAPITAL SERVICES, INC.;
ABRAMS GRATTA & FALVO, P.C.;
PETER S. FALVO, ESQ.; JOHN DOES A-Z;
EUGENE M. LAVERGNE, ESQ.

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 00-cv-03366)
District Judge: Hon. William H. Walls

Argued on March 27, 2007

Before: FISHER, JORDAN and ROTH, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued on March 27, 2007.

On Consideration whereof,

IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court entered December 27, 2005, be and the same is hereby **affirmed in part** and **reversed in part** and **remanded** for further proceedings consistent with this opinion.

Costs taxed against the appellants.

All of the above in accordance with the Opinion of this Court.

ATTEST:

/s/ Marcia M. Waldron
Clerk

Dated: November 27, 2007

Filed 12/27/2005

FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

THE LIGHTHOUSE INSTITUTE FOR EVANGELISM, INC. d/b/a THE LIGHTHOUSE MISSION, and REVEREND KEVIN BROWN

Plaintiffs,

v.

THE CITY OF LONG BRANCH, ABRAMS GATTA & FALVO, P.C., PETER S. FALVO, ESQ., EUGENE M. LAVERGNE, ESQ., and JOHN DOES A-Z

Defendants.

OPINION
Civil Action
No. 00-3366

WALLS, District Judge.

This matter is before the Court on defendant City of Long Branch's motion for summary judgment and plaintiffs Lighthouse Institute for Evangelism

and Reverend Ken Brown's (collectively "the Mission" or "plaintiffs") cross-motion for summary judgment on their claims under the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). The Court heard oral argument on December 7, 2005. Plaintiffs' cross-motion for summary judgment is denied; Long Branch's motion for summary judgment is granted.

FACTS AND PROCEDURAL HISTORY[1]

On June 8, 2000, plaintiffs filed a Complaint in Lieu of Prerogative Writ in Monmouth County Law Division. Defendants removed it to this Court. On September 22, 2000, President Clinton signed the RLUIPA into law. Plaintiffs then filed an Amended Verified Complaint on October 23, 2000, which added a claim under RLUIPA. On April 7, 2003 this Court denied Plaintiffs' requests for injunctive relief and summary judgement [sic] on its facial challenge to Long Branch's zoning Ordinance 20-6.13 (the "Ordinance"). The Court also granted summary judgment to defendants on the Mission's "as-applied" constitutional claims on ripeness and failure to exhaust administrative remedies grounds. On June 25, 2004, the Third Circuit upheld this Court's decision denying injunctive relief. The parties reinstated the dismissed constitutional claims by consent agreement on July 8, 2004. Plaintiffs filed a Second Amended Complaint on July 26, 2004.

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[1] Because the Court is writing only for the parties, it is presumed that the facts and history of this extensively litigated case are well known to all the parties. As such, the court notes that the following exposition of facts is not exhaustive and refers the parties to the several decisions in this case for elaboration.

The Mission is a New Jersey nonprofit corporation formed in 1991. Its stated purpose is to administer teachings of the bible to its congregation, operate a ministry school and operate benevolent services and agencies to the community. Compl. at ¶ 1. It currently owns the property at 162 Broadway in Long Branch. Plaintiff Reverend Kevin Brown resides at 162 Broadway and is the Mission's presiding minister. Before moving to 162 Broadway, the Mission operated a soup kitchen across the street at 159 Broadway.

The Property at 162 Broadway in Long Branch ("the Property") is located within a C-1 Commercial District designated by the Ordinance, then amended to Ordinance § 345.30. Under this Ordinance, a church is not listed as a "permitted use" within a C-1 Commercial District. Section 20-6.13(a)(3) specifically lists other permissible uses which plaintiffs term "assembly," including "Assembly hall, bowling alley, and motion picture theater." Other uses permitted include restaurants, colleges, municipal buildings, parks, playgrounds, health spas, gyms, barber shops, and beauty salons. Plaintiffs applied to use the property as a church, but their application was denied.

In October, 2002, the City of Long Branch passed an amended redevelopment ordinance 47-02 ("Redevelopment Ordinance") pursuant to N.J.S.A. 40A:12A-1, the "Local Redevelopment and Housing Law." Ordinance 47-02 is significant because it officially includes plaintiffs' property, 162 Broadway, Block 283, Lot 9 in the "City of Long Branch

Broadway Redevelopment Program."

Under N.J.S.A.. 40A:12A-4, the City of Long Branch became empowered as the governing body. The City and City Planning Board acted in accordance with this statute and the "Broadway Corridor" which includes plaintiffs property, was declared to be an area in need of rehabilitation, under N.J.S.A. 40A:12A-5. When the ordinance declaring the Broadway Corridor to be subject to a redevelopment plan was passed in October of 2002, plaintiffs did not challenge the Ordinance either as to its constitutionality or it being arbitrary, capricious and unreasonable.

Once the ordinance was adopted pursuant to N.J.S.A. 40A:12A-7(c), the redevelopment plan superceded [sic] "applicable provisions of the development regulations of the municipality or constitutes an overlay zoning district within the redevelopment area. When the redevelopment plan supersedes any provision of the development regulations, the ordinance adopting the redevelopment plan shall contain an explicit amendment to the zoning district map included in the zoning ordinance." N.J.S.A. 40A:12A-7(c). Neither this Court, not the Third Circuit was asked to address the constitutionality of this new ordinance.

Facts Relating to Long Branch

Plaintiffs contend their application for a permit has been thwarted purposely by Long Branch's Planning Board (the "Board") by

deliberately allowing the application to languish. They claim that the Board stalled the application with technical requests, failed to place the application on its agenda when those requests were fulfilled and failed to consider the Mission's request for a waiver of the fee application on the basis of its non-profit status. Plaintiffs also claim that by not granting use, the Board prevented the Mission from obtaining its tax exemption. Furthermore, plaintiffs allege that the Board has "harassed" and "intimidated" both the Mission and Reverend Brown, by issuance of various summonses for alleged code violations.

The Second Amended Complaint states the following claims against Long Branch: (1) Prerogative Writ-Mandamus under New Jersey R.4:69-1, which seeks injunctive and equitable relief, as well as compensatory and consequential damages (Count I); (2) violation of the Free Exercise Clause of the First Amendment and of Article I, para. 3 of the New Jersey Constitution under 42 U.S.C. § 1983 (Counts II-III); (3) violation of the Establishment Clause of the First Amendment and Article I, section 4 of the New Jersey Constitution under § 1983 (Count IV); (4) violation of the Equal Protection Clause of the Fourteenth Amendment under § 1983 (Count V); (5) violation of substantive Due Process rights under the Fourteenth Amendment and 1983 (Count VI); (6) discriminatory use of zoning power in violation of the First, Fifth and Fourteenth Amendments (Count VII); (7) discriminatory use of zoning power in violation of article I, sections 1, 3, 4, 5, 18 and 20 of the New Jersey Constitution (Count VIII); (8) violation of the Fair Housing Act, 42 U.S.C.

§ 3601 et seq. (Count IX); (9) violation of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc (Count XIII); (10) statutory and constitutional challenges to the Redevelopment Ordinance (Count VIV).

On April 7, 2003, this Court dismissed Counts II-IX and XIII of Plaintiff's Amended Complaint, without prejudice, on ripeness grounds and directed plaintiffs to exhaust administrative remedies. The Court incorporates by reference the factual background described in its April 7th Opinion.

Reverend Brown states that after the Court's April 7, 2003 dismissal, he went to City Planner Carl Turner for purposes of determining the administrative review process in light of the new Redevelopment Program. Plaintiffs sought guidance from the Long Branch City Council, which oversees the Redevelopment Program. City Administrator Howard Woolley provided plaintiffs with Long Branch's "Oceanfront-Broadway Redevelopment Program RFQ/RFP" manual.

After reviewing the Request For Qualification/Request For Proposal ("RFQ/RFP") manual, plaintiffs submitted an RFQ application[2]

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[2] The RFQ/RFP application is a two-part process. The first part, the RFQ application, must contain: (1) a Development Team Description identifying the development team members, leader, and their respective roles; and (2) a description of the Team Experience, relating the team's previous experience with development objectives for the sector, and detailing previous projects relevant to the objectives of the sector. The manual also requires for each previous project

seeking a waiver of the prohibition of church use at 162 Broadway and a designation of plaintiffs as the developer for 162 Broadway. By letter dated December 23, 2003, Long Branch's Special Redevelopment Counsel, Peter A. Buchsbaum, Esq., notified plaintiffs that their RFQ Application had been rejected.

Defendants argue that plaintiffs allowed the Redevelopment Ordinance to become effective in October 2002, and approximately a year later, filed for developer status by submitting an application which demanded uses not permitted under the redevelopment ordinance. The application was rejected on December 23, 2003. After plaintiffs' application was rejected, the next step was to appeal to the Mayor and Council, the governing body of a municipality, and request a hearing on the amendment of the Plan to authorize the requested uses. *See*N.J.S.A. 40A:12A-7. In accordance with the statute, plaintiffs appealed the rejection on April 19, 2004. Administrative hearings were held before the Long Branch City Council on May 11, 2004. The Council voted unanimously to deny the plaintiffs' request to approve their requested uses and amend

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submitted: project name, description, location, photos/brochures, construction value; year project site plan was approved, year project was completed/received certificate of occupancy, the member's role in development, financing sources, ownership and projects references. The second part, the RFP, is a very detailed process requiring things such as a Project Concept, Conceptual Site Plan, an Acquisition Plan, a Financial Plan, etc. Before being selected to proceed to the RFP, a prospective developer must first satisfy the RFQ requirements.

the Redevelopment Plan to allow churches.

DISCUSSION

I. Standard for Summary Judgment

"[S]ummary judgment is proper 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.' " *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (quoting Fed.R.Civ.P. 56(c)). In deciding a motion for summary judgment, the Court must construe the facts and inferences in a light most favorable to the non-moving party. *Pollock v. American Tel. & Tel. Long Lines,* 794 F.2d 860, 864 (3d Cir.1986). The role of the court is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A genuine issue of material fact exists only if the evidence presented would enable a reasonable jury to return a verdict for the nonmovant. *See Anderson,* 477 U.S. at 248, 106 S.Ct. 2505. Summary judgment must be granted if no reasonable trier of fact could find for the non-moving party. *See id.* at 249, 106 S.Ct. 2505.

To defeat summary judgment, an issue of fact in dispute must be one which a reasonable fact finder could base a verdict for the non-moving party and one which is essential to establishing the claims. *See*

Anderson, 477 U.S. at 248, 106 S.Ct. 2505. The non-moving party may not defeat summary judgment by simply resting on the argument that the record contains facts sufficient to support his claims. *See Big Apple BMW, Inc. v. BMW of North America, Inc.,* 974 F.2d 1358, 1362 (3d Cir.1992), *cert. denied,*507 U.S. 912, 113 S.Ct. 1262, 122 L.Ed.2d 659 (1993); *O'Donnell v. U.S.,* 891 F.2d 1079, 1082 (3d Cir.1989). Rather, the non-moving party must go beyond the pleadings and, by affidavits or other evidence, designate specific facts showing that there is a genuine issue for trial. *Celotex,* 477 U.S. at 324, 106 S.Ct. 2548; Fed.R.Civ.P. 56(e). Such affidavits must be based "on personal knowledge," establish "such facts which would be admissible," and "show affirmatively that the affiant is competent to testify in all matters stated therein." *Maldonado v. Ramirez,* 757 F.2d 48, 50 (3d Cir.1985); *see also* 6 J. Moore, W. Taggert & J. Wicker *Moore's Federal Practice* § 56.22[1] (2d ed.1985). "[C]onclusory statements, general denials, and factual allegations not based on personal knowledge [are] insufficient to avoid summary judgment." *Olympic Junior, Inc. v. David Crystal, Inc.,* 463 F.2d 1141, 1146 (3d Cir.1972); *see also First Nat'l Bank of Arizona v. Cities Service Co.,* 391 U.S. 253, 288-290, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968); *Gostin v. Nelson,* 363 F.2d 371 (3d Cir.1966).

II. Issue of Mootness

Long Branch initially suggests that plaintiffs claims regarding the original Ordinance are moot now that the Redevelopment Ordinance has superceded it. However, the original Ordinance is not

mooted here, where plaintiffs seek compensatory damages sustained by the allegedly unconstitutional nature of the ordinance. *Nextel West Corp. v. Unity Township,* 282 F.3d 257, 262-63 (3d Cir.2002).

III. Statutory Challenge (RLUIPA)

The Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000c*et seq.*, was passed by Congress in 2000, mainly in response to concerns that land use regulations were increasingly being utilized to discriminate against religious institutions. The RLUIPA, which has withstood numerous constitutional challenges, has two particular provisions at issue in this case. First, the RLUIPA has a substantial burden provision that requires land-use regulations that substantially burden religious exercise to be the least restrictive means of advancing a compelling governmental interest. Second, the Act has a nondiscrimination provision, which prohibits land-use regulations that disfavors religious uses relative to nonreligious uses. Specifically, the Act provides:

(a) Substantial burdens

(1) General rule: No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution-

(A) is in furtherance of a compelling

governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

(2) Scope of application: This subsection applies in any case in which-

(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;

(B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

(b) Discrimination and exclusion

(1) Equal terms: No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

(2) Nondiscrimination: No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

(3) Exclusions and limits: No government shall impose or implement a land use regulation that-

(A) totally excludes religious assemblies from a jurisdiction; or

(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

RLUIPA, 42 U.S.C. § 2000cc. Plaintiffs have alleged claims under both the substantial burden and nondiscrimination prongs of the RLUIPA. The Court will address both prongs.

A. Substantial Burden

To prevail under the substantial burden prong of the RLUIPA, plaintiffs must demonstrate that the regulation at issue actually imposes a substantial burden on religious exercise. This test is not the same as establishing that plaintiffs' use of its land, which amounts to religious exercise and is also a required element, amounts to a substantial burden. Notwithstanding the distinction, plaintiffs contend that establishing any burden on the use of its land is tantamount to a substantial burden. As noted by the Seventh Circuit, this contention does not hold weight. *Civil Liberties for Urban Believers v. City of Chicago,* 342 F.3d 752, 761 (7th Cir.2003) (hereinafter "*C.L.U.B* ") ("Application of the

substantial burden provision to a regulation inhibiting or constraining any religious exercise, including the use of property for religious purposes, would render meaningless the word 'substantial,' because the slightest obstacle to religious exercise incidental to the regulation of land use-however minor the burden it were to impose-could then constitute a burden sufficient to trigger RLUIPA's requirement that the regulation advance a compelling governmental interest by the least restrictive means.").

The substantial burden test requires a demonstration of something more, and numerous courts which have addressed the meaning of "substantial burden" have found, and legislative history indicates, that the phrase should be interpreted by reference to the test as outlined by the federal courts in addressing the federal Religious Freedom Restoration Act, 42 U.S.C. § 2000bb and First Amendment jurisprudence. As such, courts reviewing the history of the test have found that demonstrating substantial burden requires more than a general limitation on free exercise. Rather, the test requires a showing that the burden prevents adherents from conducting or expressing their religious beliefs or causes them to forgo religious precepts. As described by the Third Circuit, a substantial burden is one that "necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise ... effectively impracticable." *Lighthouse Institute for Evangelism v. City of Long Branch,* 100 Fed.Appx. 70 (3d Cir.2004), *citing C.L.U.B.,* 342 F.3d at 761. A mere inconvenience is not enough to meet the "substantial

burden" requirement, nor is it a substantial burden when a law merely "operates so as to make the practice of religious beliefs more expansive." *Braunfeld v. Brown,* 366 U.S. 599, 605, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961).

Here, the circumstance that the Ordinance and Redevelopment Ordinance require plaintiffs to find a location outside the narrowly drawn Broadway Redevelopment Zone, simply does not amount to a substantial burden. *See C.L.U.B,* 342 F.3d at 761. There is evidence which demonstrates that suitable alternative venues are available to the Mission in 90% of the rest of the City of Long Branch.[3] Further, as the Third Circuit previously noted, the requirement that the Mission demonstrate substantial burden under section (a) is substantially weakened because it had operated as a soup kitchen at a rented location across the street for many years. *Lighthouse,* 100 Fed.Appx. at 77. Finally, as Long Branch notes, Reverend Brown has testified in both a hearing before the Long Branch City Council and at his deposition that the Mission could be located elsewhere, including relocation outside of the Broadway Development Zone. These undisputed facts demonstrate that there is no substantial burden to plaintiffs in having to relocate outside the Broadway Redevelopment Zone.

Because there is no substantial burden upon

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[3] Upon query by the Court at time of oral argument, counsel agreed that Long Branch has approximately 35,000 in population-somewhat larger than Asbury Park and smaller than Atlantic City.

plaintiffs' practice of its religious beliefs, the Court need not address the issue of whether Long Branch had a compelling governmental interest in restricting churches and that the regulations were the least restrictive means of doing this. *See* RLUIPA, 42 U.S.C. § 2000cc(a)(1). However, without needing to reach this issue, the Court nonetheless finds that Long Branch's stated interest in creating an artistic and "dynamic commercial center" in place of what has been a deteriorating downtown is a legitimate and compelling governmental interest. Long Branch seeks to revitalize its downtown district by developing a performing art and artistic center, supported by restaurants, cafes, bars and specialty retail stores. The presence of a church within this limited zone would most likely not contribute to such development. In addition, a state ordinance prohibiting the sale of alcohol within two hundred feet of a religious organization and a local ordinance prohibiting the sale of alcohol within one thousand feet of a religious organization, would further restrict development on the block.[4] For these reasons, Long

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[4] The parties dedicated a substantial portion of oral argument to the issue of the state and local laws prohibiting the sale of alcoholic beverages. Of particular concern is the state statute which relates to the issuance of state permits for the sale of alcohol. Plaintiffs argue that the problem of these laws is mooted by their assurance that the Mission would waive the provisions as applied to them. However, the Court is not convinced that such a waiver could even be secured under either law. Moreover, as counsel for Long Branch pointed out, any waiver under the state law could not be done in perpetuity as the law requires license renewal after several years. The effect of such a renewal would essentially provide the Mission with the ability to determine whether liquor licenses could be obtained by potential future business tenants in the Broadway

Branch has a compelling interest in limiting a church within this particular zone.

B. Nondiscrimination

The Mission also claims that the Redevelopment Ordinance violates the nondiscrimination section (b) of the RLUIPA. There is a dearth of case law interpreting the nondiscrimination provision of the RLUIPA. Only one circuit court, the Eleventh Circuit, has addressed section (b), and that court read the language of the provision quite literally and expansively by holding that section (b) operates independently from section (a). *Midrash Sephardi, Inc. v. Town of Surfside,* 366 F.3d 1214 (11th Cir.2004); *see also Konikov v. Orange County, FL,* 410 F.3d 1317 (11th Cir.2005). In other words, the Eleventh Circuit held that regardless of whether the statute at issue failed to impose a substantial burden on the religious practices of the plaintiff, the zoning ordinance could still violate the equal terms provision of section (b) of the RLUIPA. With deference to the Eleventh Circuit, this Court does not agree with that rationale and reads section (b) more narrowly for the following reasons.

As legislative history makes clear and courts have concluded, the RLUIPA was designed to codify the constitutional provision of equal protection in the context of zoning ordinances. *See Freedom Baptist*

Redevelopment Zone. Counsel for Long Branch also argues, and the Court agrees, that the application of this liquor law to the Mission demonstrates that it is not similarly situated to other assemblies allowed within the zone.

Church of Delaware Cty. v. Twp. of Middletown, 204 F.Supp.2d 857, 868 (E.D.Pa.2002); *Ventura County Christian High School v. City of San Buenaventura,* 233 F.Supp.2d 1241, 1246-47 (C.D.Cal.2002). However, traditional equal protection constitutional principles require a "similarly situated" analysis of comparing land uses. *See City of Cleburne v. Cleburne Living Ctr.,* 473 U.S. 432, 447-50, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). The Eleventh Circuit altered this standard by applying a "natural perimeter" standard and rejecting the "similarly situated" analysis under *Cleburne.* Thus, under the Eleventh Circuit's test, it would be virtually impossible to apply zoning laws to houses of worship because people could congregate anywhere and would fall within the "natural perimeter" standard in every case. In essence, this reading would prohibit the zoning restrictions of churches in any location. This was clearly not the intent of Congress. *See*146 Cong. Rec. S7776 ("This Act does not provide religious institutions with immunity from land use regulation, nor does it relieve religious institutions from applying for variances, special permits or exceptions, hardship approval, or other relief provisions in land use regulations, where available without discrimination or unfair delay.") (joint statement of Sens. Hatch and Kennedy); *see also Guru Nanak Sikh Society of Yuba City v. County of Sutter,* 326 F.Supp.2d 1140, 1155 (C.D.Cal.2003) (holding that plaintiffs must demonstrate that the regulations themselves, as opposed to the way in which they were applied in this particular case, subject churches to "discrimination").

In addition, the Seventh Circuit's rationale in

C.L.U.B., which addressed section (a) of the RLUIPA, is applicable to an understanding of section (b) and Congress' intent in passing the law. Specifically, the *C.L.U.B.* court noted that the costs associated with relocation brought about because of a conflict with high-density urban land use restrictions are not sufficient to state a claim under the RLUIPA because:

> [o]therwise, compliance with RLUIPA would require municipal governments not merely to treat religious land uses on an equal footing with nonreligious land uses, but rather to favor them in the form of an outright exemption from land-use regulations. Unfortunately for Appellants, no such free pass for religious land uses masquerades among the legitimate protections RLUIPA affords to religious exercise.
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> *C.L.U.B,* 342 F.3d at 762.

As the Third Circuit recently suggested in this case, parties seeking to prove a violation of Section (b) must identify similarly situated nonsecular assemblies which are treated more favorably than secular institutions, and then identify no rational basis for the distinction related to the municipality's goal. *See Lighthouse Institute for Evangelism v. City of Long Branch,* 100 Fed.Appx. 70, 77 (3d Cir.2004); *cf. Congregation Kol Ami v. Abington Township,* 309 F.3d 120, 125 (3d Cir.2002). Here, plaintiffs must first demonstrate that the Mission is similarly situated to nonsecular assemblies before they can establish a claim for discrimination. The Court finds

that the Mission has failed to meet this burden. As suggested, the presence of a church within the Redevelopment Zone is not similarly situated with nonsecular assemblies because of state and local laws prohibiting the sale of alcohol within a certain distance of churches.

Second, a similarly situated determination cannot focus on all uses with a similar impact being treated alike because "regardless of the fact that such uses may be fundamentally distinct, we would turn zoning law on its head." *Kol Ami,* 309 F.3d at 139. To say differently, wide latitude under the similarly situated test is a slippery slope because any impact on use that affects a church may also identically impact other nonsecular, nonpermitted uses and subject practically every entity to the similarly situated test. Here, the Mission has indicated in its papers and at oral argument that among its intended uses are a house of worship, staging of religious plays, a commercial store specializing in religious material and a soup kitchen. This combination of intended uses has no similarly situated counterpart in the permitted uses set out by Long Branch's Redevelopment Plan. While certain aspects of the Mission's intended uses comport with other permitted uses under the Redevelopment Ordinance, no such combination of uses exists to conclude that the Mission is similarly situated to any nonsecular permitted uses either currently in existence or as imagined by the Redevelopment Plan. And even if the Mission can establish that they are similarly situated to other entities or institutions, Long Branch has, as discussed above in the "substantial burden" analysis, provided a compelling

interest that is the least restrictive means to that end.[5]

To this end, at least one court construing section (b) has noted that a zoning ordinance that treats most non-secular assemblies on an equal footing as secular assemblies, while giving some preference to non-secular assemblies does not violate the RLUIPA. *Petra Presbyterian Church v. Village of Northbrook,* 2003 WL 22048089 at *12 (N.D.Ill. Aug.29, 2003). Specifically, the court in *Petra* noted that:

> As amended, the zoning code treats religious and non-religious membership organizations on equal terms by excluding both from the I-1 district. Petra claims that churches are treated less favorably than restaurants and bars, which are still allowed in the I-1 district. However, all other non-religious membership organizations are also treated "less favorably" than restaurants and bars, and Petra has not cited any authority indicating either that restaurants and bars are "similarly situated" assembly uses or *that this is sufficient to*

[5] There remains a question as to the proper test under section (b) once parties have established that similarly situated entities are being treated differently. If section (b) was meant to codify the existing equal protection analysis, then a party need only establish a rational basis for the different treatment. However, if section (b) retains the more strict test of section (a), then parties must demonstrate a compelling interest that is the least restrictive means. The distinction is moot here because as the Court has previously noted, the Redevelopment Ordinance already survives the compelling interest test.

> *constitute a violation of RLUIPA. See Ventura County Christian High Sch.*, 233 F.Supp.2d at 1246-47 ("in evaluating plaintiffs claims under either RLUIPA or the Equal Protection Clause of the Fourteenth Amendment, the Court must first inquire as to whether defendants have treated plaintiffs in an unequal manner to similarly situated entities").
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> *Id.* (emphasis added).

As the Court has observed, the Eleventh Circuit's analysis of section (b) apparently creates a standard that improperly replaces the constitutional test for equal protection. A Congressional act of this sort was specifically prohibited by the Supreme Court in *City of Boerne v. Flores*, 521 U.S. 507, 519, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997). This problem is especially acute here because a reading that provides an expansive protection of religious institutions under the "natural perimeter" standard would essentially "bar all restrictions on religion [and] would likely extend beyond constitutional mandates, and potentially render the statute unconstitutional." *Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston*, 250 F.Supp.2d 961, 993 (N.D.Ill.2003); *see also C.L.U.B*, 342 F.3d at 762. In other words, plaintiffs' expansive reading of section (b) and their position that the Mission should be treated more favorably than nonsecular assemblies similarly prohibited from the Redevelopment District raises serious constitutional problems under the Establishment Clause.

The Eleventh Circuit's analysis in *Midrash*

also presumes that to prove a violation of section (b), a plaintiff does not need to demonstrate substantial burden. Such an outcome directly contradicts Congressional intent. *See*146 Cong. Rec. S7774-76 (explaining that sections (b)(1) and (b)(2) "enforce the Free Exercise Clause rule against laws that burden religion and are not neutral and generally applicable" and "the party asserting a violation of this Act shall in all cases bear the burden of proof that the governmental action in question constitutes a substantial burden on religious exercise" and finally that Section (b) "directly address[es] some of the more egregious forms of land use regulation, and provide more precise standards than the substantial burden and compelling interest tests"). Given the legislative history, it seems clear that Section (a)'s "substantial burden" test is applicable to the more precise provisions in Section (b). *See Freedom Baptist Church of Delaware,* 204 F.Supp.2d at 861. As such, plaintiffs' failure to demonstrate a substantial burden under Section (a) is fatal to his claims under Section (b).

IV. Constitutional Claims

A. *Free Exercise Claim*

The Free Exercise Clause provides that "Congress shall make no law ... prohibiting the free exercise [of religion]." U.S. Const. Amend. I. If a law is "neutral" and "generally applicable" and burdens religious conduct only incidentally, the Free Exercise Clause does not provide plaintiff with a claim. *Employment Div. v. Smith,* 494 U.S. 872, 879, 110 S.Ct. 1595, 108 L.Ed.2d 876; *Tenafly Eruv Assoc.,*

Inc. v. Borough of Tenafly, 309 F.3d 144, 165 (3d Cir.2002). Much like the Third Circuit's consideration of the facial challenges to the original Ordinance, the Redevelopment Ordinance is properly viewed as a neutral law of applicability because churches are only one of numerous uses which are not permitted. *See Cornerstone Bible Church v. City of Hastings,* 948 F.2d 464, 472 (8th Cir.1991) ("Absent evidence of the City's intent to regulate religious worship, the ordinance is properly viewed as a neutral law of general applicability."). Indeed, churches are not even specifically prohibited by the Redevelopment Ordinance, which instead prohibits all uses not specifically listed. In addition, plaintiffs have not proffered any evidence to suggest that the facially neutral Redevelopment Ordinance was exercised in such a way that secularly motivated conduct was exempted while comparable religious conduct was not. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 537, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993). Notwithstanding the facial neutrality of the Redevelopment Ordinance, strict scrutiny can also apply when it burdens rights protected by the Exercise Clause in conjunction with other constitutional protections such as freedom of association or speech, and equal protection. *See Smith,* 494 U.S. at 881, 110 S.Ct. 1595. As discussed later, such a "hybrid rights" claim fails because plaintiffs' other constitutional law claims fail.

Because the Redevelopment Ordinance is a neutral law of general applicability, rational basis applies. Long Branch has asserted a valid rational for its exclusion of certain types of businesses, assemblies, and institutions, including churches,

from the area where they are attempting artistic and commercial revitalization.

The Court also notes that under prevailing constitutional jurisprudence, the Free Exercise Clause is less protective of religious freedom than the RLUIPA. *Compare*42 U.S.C. § 20000cc-(a)(1) (prohibiting government from imposing a substantial burden on religious exercise, even if the burden results from a rule of general applicability, unless the burden furthers a compelling interest and is narrowly tailored) with *Smith,* 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (holding that laws of general applicability that incidentally burden religious conduct do not offend the First Amendment). If plaintiffs' claims can not succeed under RLUIPA, they can not succeed under the Free Exercise Clause. *See Charles v. Verhagen,* 220 F.Supp.2d 937, 952 (W.D.Wis.2002) ("Because plaintiff's claim ... failed under the heightened scrutiny required by [RLUIPA], it cannot succeed under the rational basis standard" applicable to Free Exercise Clause claims). In addition, it is well-established that "[t]he appropriate exercise of judicial power requires that important constitutional issues not be decided unnecessarily where narrower grounds exist for according relief." *Communist Party of Ind. v. Whitcomb,* 414 U.S. 441, 452, 94 S.Ct. 656, 38 L.Ed.2d 635 (1974).

Similarly, "New Jersey's Religion Clause, which contains no reference to the 'free exercise' of religion, 'is less pervasive, literally, than the Federal provision,' and therefore [New Jersey courts have] not been impelled to interpret the state constitution

more broadly than the federal constitution in cases implicating the establishment of religion." *Ran-Dav's County Kosher, Inc. v. State,* 129 N.J. 141, 151, 608 A.2d 1353 (1992). Plaintiffs' federal and state free exercise challenges to the Redevelopment Ordinance are dismissed.

B. Free Speech and Assembly

It is not clear that zoning ordinances which limit the location of religious institutions should be viewed by the courts as regulating speech potentially protected by the Constitution, or whether they merely serve as a regulation of non-expressive conduct not protected. It is clear that courts have consistently analyzed the constitutionality of zoning regulations limiting the construction of Houses of Worship under the Free Exercise Clause, not the free Speech Clause. *See, e.g., City of Boerne v. Flores,* 521 U.S. 507, 534, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997); *Messiah Baptist Church v. County of Jefferson,* 859 F.2d 820, 823-26 (10th Cir.1988); *Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood,* 699 F.2d 303, 307-08 (6th Cir.1983). As noted by the Third Circuit "if solely the act of erecting a wall separating the interior of a building from the secular world constituted 'speech,' every religious group that wanted to challenge a zoning regulation preventing them from constructing a house of worship could raise a 'hybrid' rights claim triggering strict scrutiny, a notion so astonishing that we are unaware of any court-or even any law review article-that has suggested it." *Tenafly,* 309 F.3d at 163 (citations omitted).

The Supreme Court has repeatedly stressed that land use law is one of the bastions of local control, largely free of federal intervention. *See Schad v. Borough of Mount Ephraim,* 452 U.S. 61, 68, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981) ("[t]he power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities.... [T]he courts generally have emphasized the breadth of municipal power to control land use...."); *see also Izzo v. River Edge,* 843 F.2d 765, 769 (3d Cir.1988) ("Land use policy customarily has been considered a feature of local government and an area in which the tenets of federalism are particularly strong."). The Third Circuit observes that these cases,

> demonstrate the breadth of a municipality's power to discriminate in the land use context. Indeed, because the purpose of zoning ordinances is to distinguish among uses in order to draft comprehensive municipal plans, a degree of arbitrariness is inevitable. The question presented in these cases is when does a distinction cross the constitutional line. As long as a municipality has a rational basis for distinguishing between uses, and that distinction is related to the municipality's legitimate goals, then federal courts will be reluctant to conclude that the ordinance is improper.

Congregation Kol Ami v. Abington Township, 309 F.3d 120, 136 (3d Cir.2002).

Hence, any claim regarding a violation of Free Speech and assembly should undergo rational basis review to determine whether the legislation is reasonable and bears a rational relationship to the interest that the city intends to further. *See Belle Terre v. Boraas,* 416 U.S. 1, 8, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974). The Third Circuit previously wrote in this case, which is also applicable to the Redevelopment Ordinance,

> "[t]he Ordinance in this case is content-neutral because it is not aimed at prohibiting religious speech, but is rather a zoning ordinance which identifies certain uses which advance the City's goal of promoting commercial development in its downtown district." *Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 47, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). Like the ordinance examined in *Renton,* the omission of churches as a permitted use in the district resulted not from the content of the speech involved, but from the secondary effect (or lack thereof) of their presence, i.e., churches were not identified as promoting commerce. Further, the Mission has not shown that there were no other channels for communication; rather, churches are specifically permitted in other districts and the Mission had been allowed to operate as a church in its rented property in the C-1 district.

Lighthouse Institute for Evangelism v. City of Long Branch, 100 Fed.Appx. 70, 76 (3d Cir.2004).

Long Branch's Redevelopment Ordinance is neutral and generally applicable. It is undisputed that the Redevelopment Ordinance does not regulate any form of speech on its face. Moreover, the record contains no evidence to suggest that Redevelopment Ordinance was passed for the purpose of curtailing or controlling the content of expression. The ordinance is content neutral. *Ward v. Rock Against Racism,* 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (ordinance which "serves purposes unrelated to the content of expression" is considered neutral "even if it has an incidental effect on some speakers or messages but not others"); *see also Gascoe, Ltd. v. Newtown Township,* 699 F.Supp. 1092, 1095 (E.D.Pa.1988) ("municipality's right to use its zoning power in the public interest is perhaps the paradigm of [a content neutral] restriction").

There is no question that Long Branch has a substantial interest in regulating the use of its land and that its zoning regulations promote that interest. *Renton,* 475 U.S. at 50, 106 S.Ct. 925 (asserting that "a city's 'interest in attempting to preserve the quality of urban life is one that must be accorded high respect' "(citations omitted)). The Redevelopment Ordinance does not burden any more speech than necessary to further those substantial interests. The Mission may freely disseminate its religious message in the Redevelopment Zone, as well as any other zone in Long Branch. The Mission may operate its church in the 90% of the City which permits such a facility. "In sum, because the City has an important governmental interest in regulating land use, and its zoning regulations are unrelated to the suppression of speech and do not burden any

more speech than necessary, the challenged ordinance survives intermediate scrutiny." *Grace United Methodist Church v. City Of Cheyenne,* 427 F.3d 775, 791 (10th Cir.2005). Plaintiffs have failed to establish a claim for a violation of their freedom of speech or assembly.

Likewise, while it is true that the New Jersey Constitution's provision for speech and assembly are "more sweeping in scope than the language of the First Amendment"*State v. Schmid,* 84 N.J. 535, 557, 423 A.2d 615 (1980), the state's recognition of the expansive rights has not been applied outside of a New Jersey "citizens' right to *entry* of *private* property that has been opened to the public."*Kreimer v. Bureau of Police for Town of Morristown,* 958 F.2d 1242, 1269 n. 37 (3d Cir.1992). Any analyses of the allegations regarding the facial and as applied limitations of Long Branch's Redevelopment Ordinance on plaintiffs' freedom of speech and assembly are not made any differently under state law compared to federal law. Plaintiffs fail to establish any federal or state violation of their rights to speech or assembly.

C. Freedom of Association

In addition to freedom of speech, the First Amendment also implicitly protects the corresponding freedom to expressive association. *Roberts v. United States Jaycees,* 468 U.S. 609, 622, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984) ("we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in

pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends"). The First Amendment protects associational and assembly rights in two distinct ways:

> First, the Court has held that the Constitution protects against unjustified government interference with an individual's choice to enter into and maintain certain intimate or private relationships. Second, the Court has upheld the freedom of individuals to associate for the purpose of engaging in protected speech or religious activities.

Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 544, 107 S.Ct. 1940, 95 L.Ed.2d 474 (1987).

As previously explained, Long Branch's zoning ordinance is content neutral and the Mission provides no evidence that the challenged regulations were motivated by a desire to limit associational rights. Rather, the evidence suggests that the ordinance was passed for the purpose of stimulating the development of an artistic commercial center within a limited geographical zone of downtown Long Branch. In short, the Redevelopment Ordinance does not interfere with the congregation's right to associate with one another. "[A] church has no constitutional right to be free from reasonable zoning regulations nor does a church have a constitutional right to build its house of worship where it pleases." *Messiah Baptist Church,* 859 F.2d at 826. That the Mission must comply with Long Branch's Redevelopment Ordinance does not violate its right

to association nor does the Redevelopment Ordinance violate the Mission's rights to religious speech and assembly.

D. Equal Protection

To establish an Equal Protection claim, the Mission must establish, under *Cleburne v. Cleburne Living Center,* 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985), that it was not treated like secular assemblies. 473 U.S. at 439, 105 S.Ct. 3249 ("all persons similarly situated should be treated alike"). As applied to zoning regulations, the Third Circuit has stated:

> the first inquiry a court must make in an equal protection challenge to a zoning ordinance is to examine whether the complaining party is similarly situated to other uses that are either permitted as of right, or by special permit, in a certain zone. If, and only if, the entities are similarly situated, then the city must justify its different treatment of the two, perhaps by citing to the different impact that such entities may have on the asserted goal of the zoning plan.

Kol Ami, 309 F.3d at 137. If two similarly situated uses are treated differently, a land use ordinance will be deemed irrational if the stated interest asserted to justify the different treatment is either illegitimate (an ends focus) or the classification is not rationally related to the interest (a means focus). *See Congregation Kol Ami v.*

Abington Twp., 2004 WL 1837037, at *17 (E.D.Pa. Aug.17, 2004).

In essence, the inquiry here is similar to that under section (b) of the RLUIPA; the distinction being that a determination that secular and nonsecular institutions are treated different is subject to strict scrutiny under the RLUIPA. Whereas, equal protection only requires a rational basis for the disparate treatment between the two groups. Plaintiffs cannot establish that similarly situated institutions are permitted as of right under the Redevelopment Ordinance. The Redevelopment Ordinance permits certain uses and prohibits all other uses both secular and non-secular. The ordinance applies to an overwhelmingly large number of nonsecular institutions. Long Branch has identified a rational basis for its exclusion of churches in the Redevelopment zone, namely the goal of promoting an artistic commercial development in its downtown district. This rational basis survives both the ends focus and the means focus test of rationality. That is, the classification is rationally related to the goal of promoting a limited arts and commercial center in the City of Long Branch. It is legitimate and rational to meet that end. For these reasons, plaintiffs equal protection claims must be dismissed.

Similarly, "although the equal protection analysis under the New Jersey Constitution differs somewhat from federal standards, the New Jersey Supreme Court has recognized that the two approaches are 'substantially the same' and 'will often yield the same result.' " *Sojourner A. ex rel.*

Y.A. v. New Jersey Dept. of Human Services, 350 N.J.Super. 152, 167, 794 A.2d 822 (App.Div.2002) (*quoting Drew Assocs. of NJ, LP v. Travisano,* 122 N.J. 249, 259, 584 A.2d 807 (1991)). It follows then that plaintiffs federal and state law claims are dismissed.

E. Due Process

Plaintiffs claim for violation of its substantive due process rights under the fourteenth amendment lacks any merit. Defendants rightly argue that in land use cases, a substantive due process violation can be asserted only if the action can be characterized as shocking the conscience. *U.A. Theatre Circuit v. Twp. of Warrington,* 316 F.3d 392, 398, 402 (3d Cir.2003) (noting in applying the shocks the conscience standard that it is appropriate to prevent federal courts from acting as "zoning boards of appeals"). Here, plaintiffs have alleged no facts that demonstrate that the conduct of the Long Branch shocks the conscience. Indeed, Long Branch provided plaintiffs a lengthy hearing to consider an amendment to the Redevelopment Ordinance to include churches as an acceptable use. After careful consideration, Long Branch denied the requested amendment. Plaintiffs merely allege that Long Branch's denial of the amendment and application of the Redevelopment Ordinance is shocking to the conscience. The Court does not agree.

V. Fair Housing Act Claim

Although not raised at oral argument, plaintiffs' briefing fails to point to any evidence in

the record to demonstrate that Reverend Brown's request for a pastoral residence was treated any differently from any other requests for residence *after* the Redevelopment Ordinance was passed. Plaintiffs point out the existence of future housing in the Redevelopment Zone, but that housing is not along Broadway (that is the commercial zone) which is the zone at issue. Similarly, there is no evidence that there was any discriminatory intent with regard to the city's denial of Reverend Brown's request to live in 162 Broadway. Absent any evidence of "animus against a protected group" *LeBlanc-Sternberg v. Fletcher,* 67 F.3d 412, 424 (2d Cir.1995), or discriminatory impact on pastoral residence compared to other residences, *Oxford House-Evergreen v. City of Plainfield,* 769 F.Supp. 1329, 1343-44 (D.N.J.1991), a claim under the Fair Housing Act cannot stand.

V. New Jersey Tort Claims Act

Because Plaintiff has failed to demonstrate any constitutional violations, the Tort Claims Act claims asserted against City of Long Branch are dismissed.

CONCLUSION

Plaintiffs' cross-motion for summary judgment under the RLUIPA is denied, and defendant City of Long Branch's motion for summary judgment is granted. The Complaint is dismissed with prejudice as to the City of Long Branch.

Filed 12/27/2005

FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

THE LIGHTHOUSE INSTITUTE FOR EVANGELISM, INC. d/b/a THE LIGHTHOUSE MISSION, and REVEREND KEVIN BROWN

Plaintiffs,

v.

THE CITY OF LONG BRANCH, ABRAMS GATTA & FALVO, P.C., PETER S. FALVO, ESQ., EUGENE M. LAVERGNE, ESQ., and JOHN DOES A-Z

Defendants.

ORDER
Civil Action
No. 00-3366

WALLS, District Judge.

Defendant City of Long Branch moves for summary judgment and plaintiffs Lighthouse Institute for Evangelism and Reverend Ken [SIC] Brown cross-move for summary judgment under the Religious Land Use and Institutionalized Persons Act; the Court having considered the moving papers, opposition papers, and oral argument on December 7, 2005; and for the reasons expressed in the accompanying opinion:

It is on this 21st day of December, 2005,

ORDERED that Plaintiffs' cross-motion for summary judgment under the RLUIPA is DENIED, and defendant City of Long Branch's motion for summary judgment is granted. The Complaint is dismissed with prejudice as to the City of Long Branch.

s/ William H. Walls, U.S.D.J.

United States Court of Appeals
for the Third Circuit

THE LIGHTHOUSE INSTITUTE FOR EVANGELISM INC., d/b/a the Lighthouse Mission; Kevin Brown, Reverend, Appellants,

United States of America, Intervenor-Plaintiff in D.C.,

v.

THE CITY OF LONG BRANCH; BCIC Funding Corp; Breen Capital Services, Inc.; Abrams Gratta & Falvo, P.C.; Peter S. Falvo, Esq.; Eugene M. Lavergne, Esq.; John Does A-Z.

No. 03-2343

May 28, 2004.

Before FUENTES, SMITH and GIBSON, Circuit Judges.*

OPINION OF THE COURT

SMITH, Circuit Judge.

Appellants, the Lighthouse Institute for Evangelism, Inc. and Reverend Kevin Brown (collectively, "the Mission"), appeal the District

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* The Honorable John R. Gibson, Senior Circuit Judge for the United States Court of Appeals for Eighth Circuit, sitting by designation.

Court's denial of its Motion for Preliminary Injunction. The Mission sued the City of Long Branch, New Jersey ("the City") under 42 U.S.C. §§ 1983, 3601 and 2000c*et seq.*, challenging the facial and as applied legality of Long Branch's zoning ordinance ("the Ordinance") under the First and Fourteenth Amendments and the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§ 2000c*et seq.* Both parties moved for summary judgment and the Mission also sought a preliminary injunction. At the time these cross-motions were filed, discovery had been stayed since its early stages.

The District Court ruled on the motions without conducting an evidentiary hearing,[1] dismissing all of the Mission's as applied challenges for either lack of exhaustion or ripeness, and denying the Mission's Motion for Preliminary Injunction.[2] In

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[1] The Mission has not argued that the absence of such a hearing was improper, nor is there any indication in the record that either party requested a hearing on this motion. This Court held in *Sims v. Greene,* 161 F.2d 87, 89 (3d Cir.1947), that the failure to hold an evidentiary hearing to allow a party *to defend* against the grant of a preliminary injunction may be grounds for vacating such an injunction. There is no caselaw indicating that the contrary is also true, *i.e.*, that failure to hold a hearing to allow a party to present evidence in support of its motion for injunction may be cause for vacatur. In the absence of argument from the Mission on this point, we need not address it.

[2] The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343(a) and 1367. This Court has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1), which permits circuit courts to review an interlocutory decision of the District Court denying a motion for a preliminary injunction. The Mission challenges

doing so, it noted that "Plaintiffs will not likely be able to prove, even after further factual development, that the Ordinance inherently violates their rights under RLUIPA." Because we agree that the Mission did not satisfy its burden of demonstrating a likelihood of success on the merits, we will affirm the District Court's denial of the Mission's Motion for Preliminary Injunction.

I.

Because we write only for the parties, we set forth only a brief recitation of the facts. The Mission is a Christian church which "seeks to serve the poor and disadvantaged in downtown Long Branch, New Jersey." From 1992 to 1994, the Mission carried out its activities from a rented location at 159 Broadway in the City of Long Branch. On November 8, 1994, the Mission purchased 162 Broadway, a property across the street from its rented property. Both properties are located in Long Branch's C-1 Commercial District. The Mission submitted a Zoning Permit Application to the City which sought permission to operate on the purchased property "as a church" and also requested that all applicable fees "be waived as a nonprofit church." The City denied that application because the proposed use was "not a permitted use in the Zone." The Letter of Denial also noted that the proposed use "would require prior approvals from the Zoning Board of Adjustment, including but not limited to, a use variance, site plan approval, & parking variance." In response to the

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only the denial of the preliminary injunction as to its facial claims in this appeal.

Mission's request that fees be waived, the Letter advised that "any waiver of fees ... must come from the City Council." The Mission did not appeal this decision, nor did it seek a variance from the City. Thereafter, the Mission commenced this civil action and moved for a Preliminary Injunction. The District Court denied the request for injunctive relief.

II.

We review the denial of a preliminary injunction for abuse of discretion, but any "determination prerequisite to the issuance of an injunction" is reviewed according to the standard applicable to that determination. *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly,* 309 F.3d 144, 156 (3d Cir.2002) (internal citations omitted). This Court exercises plenary review over the District Court's conclusions of law and its application of the law to the facts. *Id.* Although an appellate court generally will not disturb the factual findings supporting the disposition of a preliminary injunction motion in the absence of clear error, in the context of a First Amendment claim, this Court has a "constitutional duty to conduct an independent examination of the record as a whole, ... and cannot defer to the Court's factual findings unless they concern witnesses' credibility." *Id.* at 156-57 (internal quotations and citations omitted).

III.

Four factors determine whether a District Court will issue a preliminary injunction. The first two threshold showings which the movant must

demonstrate are: (1) that he is reasonably likely to prevail eventually in the litigation, and (2) that he is likely to suffer irreparable injury without relief. *Tenafly,* 309 F.3d at 157. If he is successful in satisfying these first two factors, then the court will consider, to the extent relevant, (3) whether an injunction would harm the party opposing the motion more than the movant, and (4) whether granting the relief would serve the public interest. *Id.* The District Court held, and we agree, that the Mission failed to make the first required showing, *i.e.,* that it had a reasonable likelihood of success on the merits.

The City's Ordinance Number 20-6.13 ("the Ordinance"), identifies the permitted uses in the C-1 Central Commercial District, which include, *inter alia:* "Assembly hall, bowling alley and motion-picture theater, provided that it is carried on within a building." Ord. No. 20-6.13(A)(3), as amended in Ordinance § 345-30. The Ordinance does not identify "church" as a permitted use. Because its application to proceed as a church was denied, the Mission argues that "Long Branch does not permit churches as 'assembly halls.' " Thus, in the Mission's view, only secular assemblies may operate in the district. The record on appeal does not support this argument, however.

Because the Mission listed "church" in its application as the proposed use for the property, it is not clear whether the City would permit the Mission to operate under the assembly hall category, had it listed that use in its application. The Ordinance does not define "assembly hall." As the Mission points out in its brief, however, the American Planning

Association's *Glossary of Zoning, Development and Planning Terms* includes religious assemblies in each of its suggested definitions for the term "assembly hall." *See* Michael Davidson & Fay Dolnick (eds.), *A Glossary of Zoning, Development, and Planning Terms,* American Planning Association Planning Advisory Service Report Nos. 491/492 at 39-40.[3] Although a number of religious uses are identified in these definitions of assembly hall, we note that the term "church" may in fact encompass a range of activities which would extend beyond the concept of an "assembly hall." *See, e.g., Grace United Methodist Church v. City of Cheyenne,* 235 F.Supp.2d 1186, 1196 (D.Wyo.2002). Therefore, denial of the Mission's

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[3] The American Planning Association provides sample definitions from various zoning statutes around the country in order to define the terms listed in its glossary. In each of the definitions provided for "assembly hall," religious uses are included. The glossary provides, in relevant part:

> assembly hall ... A building or portion of a building in which facilities are provided for ... religious ... purposes....
>
> A meeting place at which the public or membership are assembled regularly or occasionally, including, but not limited to ... churches ... and similar places of assembly....
>
> A structure for groups of people to gather for an event or regularly scheduled program. Places of public assembly include, but are not limited to ... religious institutions ... and similar facilities....
>
> A building or a portion of a building used for gathering for such purposes as ... worship, ... church, or chapel[.] ...

application as a "church" does not establish whether the Mission's application would have been approved as an "assembly hall."

It is significant that the sparse record before the District Court contained no evidence establishing that "Long Branch only allows assemblies of the secular sort," as the Mission contends in this appeal. The record before us reveals only the denial of the Mission's application which made no attempt to associate its proposed use with the assembly hall category. Moreover, as the Mission points out, there are a number of churches currently located within the C-1 district. The underlying action continues before the District Court on the facial claims, but at the early stage at which this motion was considered, the Mission simply did not make the kind of factual showing necessary to establish a likelihood of success on the merits.

IV.

With regard to its facial Free Exercise claim, the Ordinance is properly considered as a neutral law of general applicability because churches are only one of numerous uses which are not specifically permitted uses and the purpose of the Ordinance is not aimed at speech, but rather at promoting the revitalization of the City's downtown area. *See Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872, 879, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990); *see also Tenafly*, 309 F.3d at 165.[4] Other than the

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[4] *See also Mount Elliott Cemetery Ass'n v. City of Troy*, 171 F.3d 398, 405 (6th Cir.1999) ("*Smith* applies to the free

conclusory allegations in its complaint, as reiterated in the declaration of Kevin Brown, the Mission did not proffer any evidence to show that the Ordinance was either not neutral or not generally applicable. Under *Smith,* a Free Exercise claim alone cannot bar application of a neutral law of general applicability. 494 U.S. at 881, 110 S.Ct. 1595. For the reasons described below, the Mission failed to show that it had a likelihood of success on any hybrid claim.

With respect to the Mission's claim that the Ordinance violated its rights to Free Speech and Assembly, we undertake rational basis review to determine whether the legislation is "reasonable, not arbitrary" and bears "a rational relationship to a [permissible] state objective." *Belle Terre v. Boraas,* 416 U.S. 1, 8, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974). The Ordinance in this case is content-neutral because it is not aimed at prohibiting religious speech, but is rather a zoning ordinance which identifies certain uses which advance the City's goal of promoting commercial development in its downtown district. *Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 47, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). Like the ordinance examined in *Renton,* the omission of churches as a permitted use in the district resulted

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exercise challenge to the zoning decision in this case."); *Cornerstone Bible Church v. City of Hastings,* 948 F.2d 464, 472 (8th Cir.1991) ("Absent evidence of the City's intent to regulate religious worship, the ordinance is properly viewed as a neutral law of general applicability"); *Rector, Wardens, and Members of the Vestry of St. Bartholomew's Church v. City of New York,* 914 F.2d 348, 354 (2d Cir.1990) ("Landmarks Law is a facially neutral regulation of general applicability within the meaning of Supreme Court decisions").

not from the content of the speech involved, but from the secondary effect (or lack thereof) of their presence, *i.e.*, churches were not identified as promoting commerce. Further, the Mission has not shown that there were no other channels for communication; rather, churches are specifically permitted in other districts and the Mission had been allowed to operate as a church in its rented property in the C-1 district. Accordingly, we agree with the District Court that the Mission did not show that it was likely to succeed on its Free Speech claim.

On the Mission's freedom of association claim, where the rights concerned are protected by the First Amendment and "abridgement of such rights, even though unintended, may inevitably follow from varied forms of governmental action," the regulation will only be upheld where the reasons advanced for its enactment were constitutionally sufficient to justify its possible deterrent effect upon such freedoms." *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 461, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958). Even under this standard, however, the Mission did not demonstrate a likelihood of success on the merits. Tellingly, the Mission had not been prohibited or restricted at its rented location. As discussed above, the Mission presented no evidence that its application would have been rejected had it applied as an assembly. It is undisputed that the Mission could have operated by right in other districts in the City.

Finally, as to its Equal Protection claim, the Mission did not establish, under *Cleburne v. Cleburne Living Center,* 473 U.S. 432, 105 S.Ct.

3249, 87 L.Ed.2d 313 (1985), that it was not treated like secular assemblies because it did not demonstrate that it would be prohibited from operating in the C-1 district under the assembly hall category. 473 U.S. at 439, 105 S.Ct. 3249 ("all persons similarly situated should be treated alike"). Additionally, due to the dearth of evidence in the record before the District Court on the Mission's Motion for Preliminary Injunction, the Mission also failed to show that the secular assemblies it identified as having been permitted in the district (*i.e.*, the Portuguese Club, the Spanish Fraternity of Monmouth County, the Brookdale Learning Center, the Seashore Day Camp, the New Jersey Repertory Company Theater and the Monmouth Medical Center Free Clinic) were similarly situated.

V.

The Mission contends that the City violated subsections (a) and (b) of RLUIPA, 42 U.S.C. § 2000cc-2.[5] The Mission did not establish a likelihood of success on its "substantial burdens" RLUIPA claim under part (a), because it had operated for years at the rented location in the district and thus its opportunity for religious exercise was not curtailed

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[5] The Mission emphasizes its claim under part (b)(1), the "Equal Terms" provision, in this appeal but does not abandon its claims under the other parts of the statute. We will, therefore, address all of the Mission's facial claims under RLUIPA. In doing so, we note, as did the District Court, that the caselaw interpreting this relatively new statute in this and other Circuits is scarce. Because of the state of the record before the District Court in this case, we do not undertake in this opinion to clarify the state of the law in this area.

by the Ordinance. *See Civil Liberties for Urban Believers (C.L.U.B.) v. City of Chicago,* 342 F.3d 752, 761 (7th Cir.2003) ("substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise ... effectively impracticable"). Further, it is undisputed that the Mission could have operated as a church by right in other districts in the City.

Similar weaknesses also plagued the Mission's claim under part (b)(1), the Equal Terms provision. Because the Mission did not show that it would be prohibited from operating in the district if it applied under the "assembly hall" category, it could not show that the Ordinance, on its face, treated it on less than equal terms than a nonreligious assembly. Indeed, as noted above, the Mission also failed to produce evidence to support its contention that the secular assemblies it identified were actually similarly situated such that a meaningful comparison could be made under this provision. *See Congregation Kol Ami v. Abington Township,* 309 F.3d 120, 125 (3d Cir.2002).

The Mission did not show a likelihood of success on its "Nondiscrimination" claim under part (b)(2) because there is no indication on the face of the statute that any distinction is drawn between religious and secular assembly halls (or in any other category, for that matter) and the Mission did not produce any other evidence to suggest that the City had interpreted it as such. In fact, the very definition for assembly hall that the Mission provided suggests that, absent evidence to the contrary, the Ordinance is probably neutral with respect to the inclusion of

religious organizations and uses within its assembly hall category.

Finally, the Mission also failed to demonstrate that it had a likelihood of success on its claim that the City violated the "Exclusion and limits" provision of RLUIPA under part (b)(3), by either totally excluding religious assemblies from the jurisdiction or unreasonably limiting religious assemblies, institutions or structures within a jurisdiction. It is undisputed that the Mission was not totally excluded from the jurisdiction because it could have operated in other districts in the City by right. The record contained no indication that the City would have denied the Mission's application to operate within the C-1 district had it applied under the category of "assembly hall." As the Mission did not show that it was limited as a religious assembly in the C-1 district, there was therefore no need for the District Court to assess whether the alleged limitation or exclusion was "unreasonable."

VI.

On the basis of the record which was available to the District Court when it decided this Motion for Preliminary Injunction, there simply was no basis for the District Court to have concluded that the Mission had a likelihood of success on either of its facial challenges under the First Amendment or RLUIPA. The Ordinance does not exclude religious assemblies on its face and the Mission did not produce any evidence to show that the City's policy is such that it interprets the Ordinance to do so. Therefore, we will affirm the decision of the District Court.

JOHN R. GIBSON, Circuit Judge, concurring in the result and in the judgment.

I concur in the judgment, which denies the motion for a preliminary injunction and leaves open the possibility of further consideration of the issues on the motion for permanent injunction.

I have, however, some reservations about language in the court's opinion and am of the thought that these issues should be ventilated in the hearing still to come. The term "Assembly Hall" seems on its face to include a hall where people assemble for religious purposes. In my view the rejection of the church's application therefore demonstrates approval of secular assemblies and rejection of religious assemblies. Nor is the effect of the discrimination mitigated because the church could have operated elsewhere in the city; the church's mission, to "serve the poor and disadvantaged in downtown," can only be accomplished downtown. I concur with the understanding that these issues should be open for further consideration at the permanent injunction stage, rather than being barred by anything in the court's decision today.

NOT FOR PUBLICATION Filed April 7, 2003

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

THE LIGHTHOUSE INSTITUTE FOR EVANGELISM, INC. d/b/a THE LIGHTHOUSE MISSION, and REVEREND KEVIN BROWN

Plaintiffs,

v.

THE CITY OF LONG BRANCH, ABRAMS GATTA & FALVO, P.C., PETER S. FALVO, ESQ., EUGENE M. LAVERGNE, ESQ., and JOHN DOES A-Z

Defendants.

ORDER
Civil Action
No. 00-3366

Walls, District Judge.

All parties having moved for summary judgment and Plaintiffs The Lighthouse Institute for Evangelism, Inc. and Reverend Kevin Brown (collectively "Plaintiffs") having moved for a preliminary injunction against defendants the City of Long Branch ("Long Branch") and BCIC Funding Corp. and Breen Capital Services, Inc. (collectively "BCIC"), and the Court having considered the submissions of the parties, it is on this 4th day of April 2003, hereby ORDERED that:

(1) Plaintiffs' motion for summary judgment on Count III of the Amended Complaint is DENIED;

(2) Plaintiffs' motion for preliminary injunctions against Long Branch and BCIC is DENIED;

(3) Long Branch's motion for summary judgment on Count I of the Amended Complaint is GRANTED;

(4) Counts II-IX and XIII of the Amended Complaint alleging injury based on Long Branch's application of Long Branch zoning ordinances to Plaintiffs' property are DISMISSED WITHOUT PREJUDICE;

(5) Long Branch's motion for summary judgment on the punitive damages claims in Counts II-IX and XIII is GRANTED;

(6) Long Branch's motion for summary judgment on the compensatory damages claim in Count I is DENIED as moot;

(7) Long Branch's motion for summary judgment on those portions of Counts II-IX and XIII alleging injury caused by Long Branch zoning ordinances in and of themselves, rather than as applied, is DENIED;

(8) BCIC's motion for summary judgment is GRANTED; and

(9) Motion for summary judgment of defendants Abrams Gatta & Falvo, P.C. and Peter S. Falvo, Esq. is DENIED.

/s/ William H. Walls
William H. Walls, U.S.D.J.

106th CONGRESS

2d Session

S. 2869

AN ACT

To protect religious liberty, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the `Religious Land Use and Institutionalized Persons Act of 2000'.

SEC. 2. PROTECTION OF LAND USE AS RELIGIOUS EXERCISE.

(a) SUBSTANTIAL BURDENS-

(1) GENERAL RULE- No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution--

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

(2) SCOPE OF APPLICATION- This subsection applies in any case in which—

(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;

(B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved.

(b) DISCRIMINATION AND EXCLUSION-

(1) EQUAL TERMS- No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

(2) NONDISCRIMINATION- No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

(3) EXCLUSIONS AND LIMITS- No government shall impose or implement a land use regulation that--

(A) totally excludes religious assemblies from a jurisdiction; or

(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

SEC. 3. PROTECTION OF RELIGIOUS EXERCISE OF INSTITUTIONALIZED PERSONS.

(a) GENERAL RULE- No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 2 of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997), even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(b) SCOPE OF APPLICATION- This section applies in any case in which—

(1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or

(2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

SEC. 4. JUDICIAL RELIEF.

(a) CAUSE OF ACTION- A person may assert a violation of this Act as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

(b) BURDEN OF PERSUASION- If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2, the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion.

(c) FULL FAITH AND CREDIT- Adjudication of a claim of a violation of section 2 in a non-Federal forum shall not be entitled to full faith and credit in a Federal court unless the claimant had a full and fair adjudication of that claim in the non-Federal forum.

(d) ATTORNEYS' FEES- Section 722(b) of the Revised Statutes (42 U.S.C. 1988(b)) is amended--

(1) by inserting `the Religious Land Use and Institutionalized Persons Act of 2000,' after `Religious Freedom Restoration Act of 1993,'; and

(2) by striking the comma that follows a comma.

(e) PRISONERS- Nothing in this Act shall be construed to amend or repeal the Prison Litigation Reform Act of 1995 (including provisions of law amended by that Act).

(f) AUTHORITY OF UNITED STATES TO ENFORCE THIS ACT- The United States may bring an action for injunctive or declaratory relief to enforce compliance with this Act. Nothing in this subsection shall be construed to deny, impair, or otherwise affect any right or authority of the Attorney General, the United States, or any agency, officer, or employee of the United States, acting under any law other than this subsection, to institute or intervene in any proceeding.

(g) LIMITATION- If the only jurisdictional basis for applying a provision of this Act is a claim that a substantial burden by a government on religious exercise affects, or that removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, the provision shall not apply if the government demonstrates that all substantial burdens on, or the removal of all substantial burdens from, similar religious exercise throughout the Nation would not

lead in the aggregate to a substantial effect on commerce with foreign nations, among the several States, or with Indian tribes.

SEC. 5. RULES OF CONSTRUCTION.

(a) RELIGIOUS BELIEF UNAFFECTED- Nothing in this Act shall be construed to authorize any government to burden any religious belief.

(b) RELIGIOUS EXERCISE NOT REGULATED- Nothing in this Act shall create any basis for restricting or burdening religious exercise or for claims against a religious organization including any religiously affiliated school or university, not acting under color of law.

(c) CLAIMS TO FUNDING UNAFFECTED- Nothing in this Act shall create or preclude a right of any religious organization to receive funding or other assistance from a government, or of any person to receive government funding for a religious activity, but this Act may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise.

(d) OTHER AUTHORITY TO IMPOSE CONDITIONS ON FUNDING UNAFFECTED- Nothing in this Act shall--

(1) authorize a government to regulate or affect, directly or indirectly, the activities or policies of a person other than a government as a condition of receiving funding or other assistance; or

(2) restrict any authority that may exist under other law to so regulate or affect, except as provided in this Act.

(e) GOVERNMENTAL DISCRETION IN ALLEVIATING BURDENS ON RELIGIOUS EXERCISE- A government may avoid the preemptive force of any provision of this Act by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.

(f) EFFECT ON OTHER LAW- With respect to a claim brought under this Act, proof that a substantial burden on a person's religious exercise affects, or removal of that burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, shall not establish any inference or presumption that Congress intends that any religious exercise is, or is not, subject to any law other than this Act.

(g) BROAD CONSTRUCTION- This Act shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution.

(h) NO PREEMPTION OR REPEAL- Nothing in this Act shall be construed to preempt State law, or repeal Federal law, that is equally as protective of

religious exercise as, or more protective of religious exercise than, this Act.

(i) SEVERABILITY- If any provision of this Act or of an amendment made by this Act, or any application of such provision to any person or circumstance, is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of the provision to any other person or circumstance shall not be affected.

SEC. 6. ESTABLISHMENT CLAUSE UNAFFECTED.

Nothing in this Act shall be construed to affect, interpret, or in any way address that portion of the first amendment to the Constitution prohibiting laws respecting an establishment of religion (referred to in this section as the `Establishment Clause'). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this Act. In this section, the term `granting', used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

SEC. 7. AMENDMENTS TO RELIGIOUS FREEDOM RESTORATION ACT.

(a) DEFINITIONS- Section 5 of the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb-2) is amended--

(1) in paragraph (1), by striking `a State, or a subdivision of a State' and inserting `or of a covered entity';

(2) in paragraph (2), by striking `term' and all that follows through `includes' and inserting `term `covered entity' means'; and

(3) in paragraph (4), by striking all after `means' and inserting `religious exercise, as defined in section 8 of the Religious Land Use and Institutionalized Persons Act of 2000.'.

(b) CONFORMING AMENDMENT- Section 6(a) of the Religious Freedom Restoration Act of 1993 (42 U.S.C. 2000bb-3(a)) is amended by striking `and State'.

SEC. 8. DEFINITIONS.

In this Act:

(1) CLAIMANT- The term `claimant' means a person raising a claim or defense under this Act.

(2) DEMONSTRATES- The term `demonstrates' means meets the burdens of going forward with the evidence and of persuasion.

(3) FREE EXERCISE CLAUSE- The term `Free Exercise Clause' means that portion of the first amendment to the Constitution that proscribes laws prohibiting the free exercise of religion.

(4) GOVERNMENT- The term `government'--

(A) means--

(i) a State, county, municipality, or other governmental entity created under the authority of a State;

(ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and

(iii) any other person acting under color of State law; and

(B) for the purposes of sections 4(b) and 5, includes the United States, a branch, department, agency, instrumentality, or official of the United States, and any other person acting under color of Federal law.

(5) LAND USE REGULATION- The term `land use regulation' means a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.

(6) PROGRAM OR ACTIVITY- The term `program or activity' means all of the operations of any entity as described in paragraph (1) or (2) of section 606 of the Civil Rights Act of 1964 (42 U.S.C. 2000d-4a).

(7) RELIGIOUS EXERCISE-

(A) IN GENERAL- The term `religious exercise' includes any exercise of religion, whether or not

compelled by, or central to, a system of religious belief.

(B) RULE- The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.